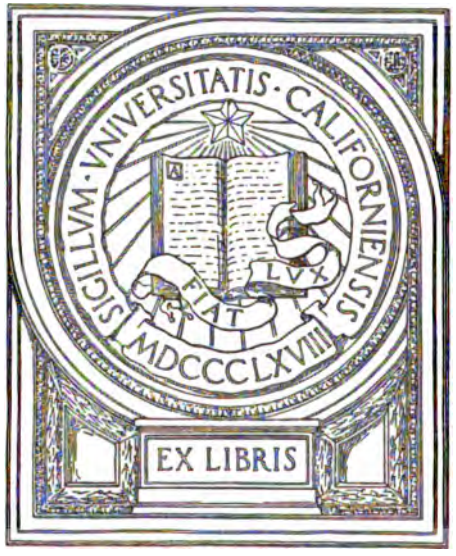
AMERICAN GOVERNMENT

HINSDALE



R. G. Gettell.

THE

AMERICAN GOVERNMENT

NATIONAL AND STATE

BY

B. A. HINSDALE, Ph. D., LL. D.

LATE PROFESSOR OF THE SCIENCE AND THE ART OF TEACHING IN THE UNIVERSITY OF MICHIGAN.

FOURTH EDITION

NEW YORK.·.CINCINNATI.·.CHICAGO
AMERICAN BOOK COMPANY

Am. Govt.

E-P 8

PREFACE.

THE study of Political Science has received a great impulse in the United States since the Civil War. In the schools, the change is particularly marked. This is owing to the direct influence of the war, to the increasing number and difficulty of political problems attending the development of society, and to the growth of interest in human questions all over the civilized world.

The change in the character of the work done in schools is almost as marked as the change in its quantity. A generation ago such work was practically limited to the study of the Constitution of the United States, carried on in a very narrow way. The sole text-book was the traditionary "Civil Government" that still lingers in some schools. This the introduction of the historical and scientific methods of investigation and teaching has changed for the better. The field of study has continued to widen until, in the best schools, it can no longer be covered even by the ablest students, and it has become a serious matter to know what portion of it to cultivate.

As the result of much experience both as a student and as a teacher of the subject, the author is of the opinion that, not only in the high school and the academy, but also in the college, the American Government should still be the central subject of study in this field. This opinion he holds on both practical and pedagogical grounds. He is further of the opinion, that this study should embrace a comprehensive view of the origin and growth of the American Government, and an adequate historical and exegetical commentary upon our dual constitution, National and State. He has accordingly attempted to furnish a text-book embodying these ideas.

The university student may profitably study books devoted to the principles of constitutional law; but such a treatise is not the text-book that the average college student, with his power of generalization and compass of facts, needs. He will find a careful study of the Constitution of the United States, accompanied by suitable historical discussion and illustration, far more profitable than constitutional disquisitions. Hence, the central position in this book is assigned to the National Constitution. Still, it is not so much the constitution as a document written in 1787, as the

constitution developed by the life of the people and construed by Congress, by the Executive, and by the Courts as shown in our legislative, administrative, and juridical history. It is the living and working constitution that concerns the American youth, and not simply a document; the constitution in action, and not the constitution in a book. Hence the author has striven, in accord with the later and better tendency in treating such subjects, to make his book strong in its historical elements. Constitutions are not made, they grow.

Hitherto the National Government has occupied disproportionate attention in teaching the American Government. The States have almost fallen out of sight. In this treatise, due prominence has been given to the fact that this government is dual or federal, and that the citizen has two loyalties and two patriotisms. It is written in the spirit of the aphorism: An indestructible Union composed of indestructible States. The growth of this dual system has been traced from its roots in the first feeble English settlements planted in Virginia and Massachusetts. But it has not been thought necessary, or even desirable, to describe the State system at as much length as the National system.

It would have been easy greatly to extend the references to books. But an over-extended literature commonly defeats its own ends. The common student especially is lost in the multitude of titles cited. The aim has therefore been to make a helpful bibliography rather than an extensive one.

Both in the original preparation of this work and in its subsequent thorough revision, the author took due pains to secure accuracy of fact and statement. But errors will creep into a book that contains so much matter-of-fact material as this one contains. In the years that have elapsed, the author has carried on a persistent warfare against these original errors, correcting them when they were discovered, and it is believed that few of them now remain. In this work he has enjoyed the coöperation of a considerable number of correspondents, who were using the work as a text-book or had read it.

Once more, a good book on a living government is necessarily a live book. Government is all the time changing, and the book must change as well. To keep this work abreast of the latest knowledge has been the ambition of the author and publishers alike from the day of the first revision. A close comparison of this last revision with the first revision, not to go back to the original, will show that many alterations have been made in the interest of perfect accuracy and up-to-date knowledge. This revision is brought down to the adjournment of the first session of the Fifty-sixth Congress, and so includes the recent important legislation in regard to financial matters and the new Territorial governments.

The author may perhaps be permitted to remark that this book has been received by students, teachers, and others with many marks of favor; and he wishes to express his thanks to such persons as have put it into practical use or have borne testimony to its merits. Still more, he is fully appreciative of the assistance of those friends, both known and unknown, who have helped him to make the book less unworthy of the public favor. So this third time he commits *The American Government* to the favorable consideration of students and teachers of this important branch of study.

B. A. HINSDALE.

The University of Michigan, June, 1900.

NOTE.—Since the foregoing Preface was written *The American Government* has been entirely reset, and new plates have been made. An opportunity has thus been afforded for further revision. The book has been brought down to the assembling of the Fifty-eighth Congress. To Chapter LIV. some matter has been added on the subject of Party Machinery.

MARY L. HINSDALE.

Ann Arbor, October, 1904.

CONTENTS.

PART III.—THE STATE GOVERNMENTS.

SUGGESTIONS TO TEACHERS.

This book has been written with three classes of persons constantly in mind. These are students who are studying the American Government in colleges, students who are studying it in high schools, academies, or normal schools of high grade, and teachers of history and civics in elementary and secondary schools. Its adaptation at once to college and secondary school students will be explained further on; but here it may be remarked that teachers in schools who are using a book of lower grade than this one, often want, and perhaps still oftener *need,* a book of high grade for their own study and improvement. Still further, the book is adapted, it is confidently believed, to the wants of several important classes of persons who are outside of schools altogether; young men and women carrying on private study, members of improvement societies and reading clubs and circles, editors and political writers and speakers desiring a manual of political information for handy reference, and intelligent citizens generally, who so often find it necessary to enlarge or to refresh their knowledge of the government under which they live.

It will be a service to all these classes of persons, and particularly to teachers, to state the cardinal features of the work.

I. The range and variety of topics introduced, the fullness of knowledge furnished, and the discriminating judgment shown in the selection of both topics and material. A large circle of reading and study has been drawn upon: books of history, volumes of statutes and law reports, treatises on political science and on constitutional law, reports of the public departments and bureaus, monographs, publications of learned societies, lives and works of public men, etc. There is not now before the public a volume of equal size, if indeed of any size, that will favorably compare with *The American Government* in these particulars.

II. The manner in which the matter has been distributed and organized. First, mention should be made of the grand divisions of the subject: The Making of the Government, its National side, and its State side. Particular pains have been taken to present these in proper proportion and equipoise. Next is the careful distribution of the matter in chapters embracing distinct subjects. It will be observed that there are no "continued" chapters. And finally, the handling of the paragraph. The author has constantly made it a point to seize clearly some single topic, or phase of a topic, to make

it the unit of treatment, and then to mark the paragraph off from all other paragraphs by giving it a distinct title and number, thus arresting and fixing the attention of the reader upon the successive units of thought. When once the student has taken in the scope of the chapter, or large division of the chapter, if there be such divisions, the next thing for him to do is to grasp firmly the idea conveyed by the title of the paragraph before him, proceeding thus in order. At this point, as in the case of other books similarly constructed, the inexperienced student needs some assistance from his teacher. "Side heads," as these titles of paragraphs are called, serve as handles by which to seize the salient features of the subjects treated; and many an excellent treatise suffers from want of them, offering no projections upon which the student can easily lay hold, but only a smooth surface.

III. The adaptation of the book, as is believed, to the needs of students and other persons who, for various reasons, wish to give different amounts of time to the subject, pursuing it, some more and some less thoroughly, and so to different grades of schools, as the college and high school or academy. Owing to the importance of this third topic, it will be well to go somewhat into detail.

1. The Introduction deals with the leading conceptions and terms of political science; it is not an integral part of the book, and teachers can make more or less use of it, or none at all, as they may elect.

2. Some teachers who have taught the Making of the Government as a part of history will wish practically to limit their instruction to the Government as it is under its National and State aspects. These should either omit the Introduction and Part I. altogether, or touch them but lightly.

3. Others will wish to teach the National Government, with merely incidental reference to the States. These should omit Part III.

4. Still others may wish only a Manual of the Constitution, with matter on the two other topics to which they can refer their students. These will find such a manual in Part II.

5. Two kinds of type have been used throughout. The main propositions, making up the skeleton of the discussion, are put in the larger type; the subordinate propositions, devoted to an enlarged view of the subject, or to the illustration of particular topics, in smaller type. The result is that nearly all the chapters contain a double view of their subject,— the one more compendious, the other more elaborate; or, in other words, two books have in reality been put inside the same covers. Take, for example, Chapter I., the subject of which is, "The Thirteen English Colonies Planted." The series of paragraphs, "The Right of Discovery," "First Divi-

sion of North America," "London and Plymouth Companies," "Colonies Planted by Companies," "Colonies Planted by Proprietors," "Voluntary Colonies," "Agency of the Home Government," "Classes of Colonists," "Ideas of the English Colonists," and "The Rights of Englishmen," furnish an outline to those who wish merely an outline. The special treatment of the Southern Colonies,— Virginia, Maryland, the Carolinas, and Georgia; the Northern Colonies, embracing the Plymouth Company, Plymouth, the Plymouth Compact, Massachusetts, Connecticut, Rhode Island, and New Hampshire; the Middle Colonies,— New York, New Jersey, Pennsylvania, and Delaware,— will enlarge the field and meet the wants of those who wish a fuller view of American colonization. Or take Chapter III., "America Independent." The paragraphs in larger type will give a limited view, while these in connection with those in smaller type will give a comprehensive view, of the movement for independence.

The obvious conclusion is this: If the time allotted to the subject, and the ability of the pupil or class, are sufficient to justify the attempt, all the matter can be presented; but if the time allotted to the subject, or the ability of the class, does not admit of such extended treatment, then the work can be easily limited to suit circumstances. What the author regards as good reasons for teaching the Federal Government before the State Governments, at the stage of progress that this work represents, are presented in Chapter XII. Those teachers who do not concur in those reasons or who have some special end to gain, can reverse the order of Parts II. and III. If Part I. is to be studied at all, no matter how hastily, it should be taken before the other two, or either of them.

A competent teacher of the subject of Government will naturally turn his mind to its pedagogical side. The question will arise, What is the educational value of the study? To this question a few remarks may be directed.

Below the college, at least, the principal end of the study should be practical. The study of government is the pursuit of political knowledge, and such knowledge is valuable, first of all, for practical purposes. The art of politics, or of government, is one of the most important arts. It concerns, and should interest, everybody. Man is a social being; he lives in, and must live in, society. But society cannot exist without government, and this want again is met by man's political nature. Still more, he attains his fullest perfection in that social condition which we call civil society, or the state; and this condition involves government of an elaborate and highly organized form. These ideas have been duly set forth in the Introduction. However, the point is not there made, or at least is not insisted upon, that the successful operation of a highly organized govern-

ment intimately depends upon the education and character of the citizens. Aristotle insisted that education must have regard to the constitution, and that it is the great means of uniting the state. "The citizen should be molded," he says, "to suit the form of government under which he lives. For each government has a peculiar character, which originally formed, and which continues to preserve it. The character of democracy creates democracy, and the character of oligarchy creates oligarchy; and always the better the character the better the government." He argues further that "women and children must be trained by education with an eye to the state, if the virtues of either of them are supposed to make any difference in the virtues of the state. And they must make a difference; for the children grow up to be citizens, and half the free persons in a state are women." Montesquieu also argues that education should be relative to the principles of government. "The laws of education are the first impressions we receive, and, as they prepare us for civil life, each particular family ought to be governed pursuant to the plan of the great family, which comprehends them all." While these remarks apply with force to governments of every kind, they apply with greatest force to a democracy or republic, where the people themselves do the governing, either directly or indirectly. No people that has been molded by an exclusively monarchical or aristocratical society, and is familiar only with the corresponding institutions, can carry on a free government. In his Farewell Address Washington insisted that the more potent public opinion is in any country, the greater the need of its being intelligent; and he might have added, *and particularly upon political subjects.*

Attention may be directed to three points especially. The first is that the American pupil should be taught his rights under the government; the second is that he should be taught his duties as related to those rights; and the third is that a spirit should be created that will lead him to insist upon the one and to perform the other. Unless the great body of citizens living under a republic shall measurably conform to this standard of activity, that is, insist upon their rights and discharge their duties to the state, the republic cannot long be maintained. Professor Bryce, in the article that is referred to below, lays deserved emphasis upon this point. He says that teachers should not be deterred by the abstractness of the subject "from trying to make the pupils understand the meaning of such terms as the nation, the state, and the law." "You need not trouble yourself," he goes on to say, "to find unimpeachable logical definitions of these terms; that is a task which still employs the learned. What is wanted is that he should grasp the idea, first, of the community — a community inhabiting a country united by various ties, organized by mutual protection, mutual help, and the attainment of

certain common ends; next, of the law, as that which regulates and keeps order in this community; next, of public officers, great or small, as those whom the law sets over us and whose business it is to make us obey the law, while they also obey it themselves." This counsel is directed to the teacher of the school; and it is not going too far to insist that the pupil who leaves the elementary school at the close of its course of study should be well grounded in these ideas. Such teaching will not fail to develop in good measure that high civic spirit which has been so characteristic of the great commonwealths and which is so essential to good government.

But government, or politics, is more than an art; it is a science as well. Strictly speaking, the exclusive pursuit of the study as a science does not look directly to practical ends, but rather to disciplinary and culture ends. Now the aim is the formation and the adorning of the mind. To a degree this advantage will attend the work below the college, if it is properly done, since the guidance value and the disciplinary value of study to a considerable extent overlap. In the college or university this second end will come much more distinctly into view. It may perhaps be assumed that the student has sufficient political information to answer the direct ends of citizenship; but he should not assume that the study has no further interest, for it is a great instrument of mental improvement. It would be strange indeed if such a book as Aristotle's *Politics* should have less disciplinary and culture value than a book dealing with birds, insects, or fishes.

A second pedagogical question may arise, viz: What methods of teaching should be employed? This question is dealt with, as far as it relates to this book, in Chapter XII. For the rest, it will suffice to refer the reader to a few authorities who deal with that subject. Unfortunately, the quantity of pedagogical literature that deals directly with the study of government is small.

Compayré has a chapter entitled "Morals and Civic Instruction," in his *Lectures on Pedagogy*. Mr. Herbert Spencer pays some attention to teaching politics in his essay, "What Knowledge is of Most Worth?" which constitutes the first chapter of his well-known work entitled *Education*. Mr. C. F. Crehore has an article, "The Teaching of Civics in Schools," in *Education*, Vol. VII. (1887), p. 264; a second article, "Foundation Principles of Government," p. 546 of the same volume of the same publication; and still a third, "Jenkins's Bend: A Primary Study in Government," p. 547. Mr. J. E. Vose is the author of two articles entitled, "Methods of Instruction in Civics," found on pp. 531 and 617 of the same volume of *Education*. Mr. J. W. McDonald has a paper, "Teaching Civics," in *The Academy*, Vol. V. (1890), p. 373. The Right Honorable James Bryce's article, the "Teaching of Civic Duty," found in *The Contemporary*

Review, July, 1893, p. 14, should not be overlooked. Dr. W. T. Harris also has some valuable remarks in the "Report on Correlation of Studies," which forms the second part of the *Report of the Committee of Fifteen*. See *The Educational Review*, March, 1895; also numerous republications of the same report. The author also refers to the chapter on "Teaching Civics," in his work entitled *How to Study and Teach History*.

In the course of the work, occasional points of likeness and unlikeness of the American government to the English government have been mentioned. Comparative study of political institutions can be extended by the teacher of the present subject in every direction, limited only by his own knowledge and the ability and time of his class. To facilitate such study, a few references are here given.

Borgeaud, *Adoption and Amendment of Constitutions in Europe and America.*

Dr. E. A. Freeman, *Comparative Politics.*

Frank J. Goodnow, *Comparative Administrative Law. An Analysis of the Administrative Systems, National and Local, of the United States, England, France, and Germany.*

J. N. Larned, *History for Ready Reference, from the best Historians, Biographers, and Specialists.* This work, which consists of five volumes, contains the following documents: Constitution of the Argentine Republic, Constitution of Brazil, Constitution of Canada, Constitution of England, Constitution of France, Constitution of Germany, Constitution of Japan, Constitution of Lycurgus, Constitution of Mexico, Constitution of Norway, Constitution of Prussia, Constitution of Sweden, Constitution of the Swiss Confederation, Constitution of Venezuela. Reference may also be made to the references and notes, relating to still other constitutions.

J. Scott Keltie, *The Statesman's Year Book, Statistical and Historical Annual of the World.*

J. J. Lalor, *Cyclopædia of Political Science, Political Economy, and United States History.*

All the principal cyclopedias contain valuable articles on political subjects. It will not be amiss to refer to some special authorities relating to four or five leading governments.

CANADA. Munro, *The Constitution of Canada;* Bourinot, *A Manual of the Constitutional History of Canada from the Earliest period to the year 1888, including the British North American Act of 1867, etc.*

ENGLAND. Fonblanque, *How we are Governed, or the Crown, the Senate, and the Bench;* Bagehot, *The English Constitution,* New and Revised Edition; Dicey, *Lectures Introductory to the Study of the Law of the Constitution;* Anson, *The Law and Custom of the Constitution,* Part I., "Parliament," Part II., "The Crown";

Craik, *The English Citizen*,— a series of short books on his rights and responsibilities,— 12 volumes.

FRANCE. Lebon and Pelet, *France as it is*,— especially written for English readers, and translated from the French; *Constitution and Organic Laws of France from 1875-1889*,— translated, with an historical introduction, by C. F. A. Currier. *Annals of the American Academy of Political and Social Science*, Vol. III., Supplement, March, 1893.

GERMANY. James, *The Federal Constitution of Germany, with an Historical Introduction;* Dawson, *Germany and the Germans;* Turner, *A Sketch of the German Empire from Early Times to the Dissolution of the Empire;* Bryce, *The Holy Roman Empire.*

SWITZERLAND. Vincent, *State and Federal Government in Switzerland;* Adams and Cunningham, *The Swiss Confederation;* Lowell, "The Referendum in Switzerland and America" (*The Atlantic Monthly*, April, 1894).

THE AMERICAN GOVERNMENT.

INTRODUCTION.

THE SCIENCE OF POLITICS.

REFERENCES.

I. WORKS ON POLITICS.— Aristotle, *The Politics;* Burgess, *Political Science and Constitutional Law,* Part I., Books I., II.; Pollock, *Introduction to the History of the Science of Politics;* Sidgwick, *Elements of Politics;* Wilson, *The State,* I., II.; Woolsey, *Political Science;* Lieber, *Civil Liberty and Self-Government.* See also the articles on "Political Science" and "Politics, Nature and Character of," in Lalor's *Cyclopædia of Political Science, etc.*

II. THE STATE, DEFINITIONS OF.— Cooley, *Constitutional Limitations,* Chap. I.; Phillimore, *Commentaries upon International Law,* Part I., Chap. I.; Wheaton, *Elements of International Law,* Part I., Chap. II.

III. ON FEDERAL GOVERNMENT.—Fiske, *American Political Ideas;* Freeman, *History of Federal Government,* Chap. II.; Hart, *Introduction to the Study of Federal Government.*

IV. ON CONSTITUTIONS.— Cooley, *Comparative Merits of Written and Prescriptive Constitutions* (reprinted from *Harvard Law Journal);* Jameson, *The Constitutional Convention,* Chaps. I.-III.; Tiedeman, *The Unwritten Constitution of the U. S.*

V. SOCIOLOGY.— Small and Vincent, *Introduction to the Study of Society.*

I. SOCIETY.

1. **Man a Social Being.**—It is a famous saying of Aristotle's that man has a social instinct planted in him by nature. The meaning of this saying is, that men tend to live together and to depend upon one another. In all ages and countries we find them sharing

a more or less common life. They cannot make progress, be happy, or in the end even exist otherwise. There are indeed men called hermits, who bury themselves in the solitude of some forest or dessert, mountain or island. But these men are always few in number; besides, they are born and reared in society, and they either return to it, or they become more and more like the animals in their way of living, and finally die alone. Men cannot live separate and apart; they must obey their social nature and live together, or they will lose their humanity. As Aristotle says: "The individual when isolated is not self-sufficient; and therefore he is like a part in relation to the whole. But he who is unable to live in society, or who has no need, because he is sufficient for himself, must be either a beast or a god; he is no part of a state."[1] Or, as another writer puts it: "A man would no more be a man if he lived alone in the world, than a hand would be a hand without the rest of the body."

2. **Society Defined.**—Men living together in human relations constitute society in the general sense of the term. The men so living in any region or district form a society. But since these local societies are also connected; since they have much in common; and since men have one social nature, we also use the word in the broadest sense, and speak of the human race as forming one society. Social means pertaining to society. The science of society is called Sociology. The Latin verb *sociare* means to meet together, to associate; the noun *socius*, a fellow or sharer, an associate or companion; and *societas*, from which society is derived, a union, communion, or association. The great ends or objects of society are two in number, and must be carefully defined.

3. **Rights and Duties.**—Men have rights that they should enjoy, and duties that they ought to perform. They are entitled to life, liberty, and the pursuit of happiness so long as they properly conduct themselves. They must also regard the lives, liberty, and happiness of their fellows. Securing to men their rights and compelling them to perform their duties, together constitute the maintenance of justice. But since some men, left to themselves, will not do justice, there must be in society some authority or power that will look after the matter and see that justice is done. Accordingly, justice is the first duty of society. As Aristotle says: "Justice is the bond of men in states, and the administration of justice, which is the determination of what is just, is the principle of order in political society."

4. **Social Progress.**—The well-being of society — particularly advanced society — requires a great many things to be done that are not embraced in justice. Roads and bridges must be built and kept

[1] I., 2, 15.

in order; harbors and lighthouses must be constructed; letters and newspapers must be carried from place to place; schools and education must be furnished; the arts, sciences, and good morals must be fostered. Nor can these things be provided by single men, or by a few men associated together, even if they are disposed to provide them; they call for the united strength of the community. Hence the promotion of its own progress is the second duty of society.

II. GOVERNMENT.

5. The Office of Government.—Government is the instrument or agent which society uses directly to secure these ends, *viz.*, justice and progress. On the one side, government consists of customs, rules, or laws commanding what society wishes to have done and forbidding what it does not wish to have done; on the other, it consists of rulers or officers whose business it is to have these rules or laws enforced. It is easy to see what would be the result if a society were without government. Not only would progress be impossible, but society could not exist. First would come anarchy, or that social state in which every man does as he pleases, and then destruction. Society and social order go together. Government is a universal fact. Man, society, and government are always found together; these are the broadest terms in the vocabulary of political science. A group of savages eating shell-fish on the seashore has no written laws, no legislature, no courts, no president; but it has some customs that take the place of laws, and a head, as the father of the family or the chief of the tribe, who sees that these customs are enforced. Government will always be rude and simple when society is rude and simple, but there will be government. Aristotle says: "Man is more of a political animal than bees or any other gregarious animals." Govern and governor are from the Latin *gubernare* and *gubernator*, which primarily mean to steer a ship and a pilot or steersman.

6. Government Coercive.—Government then is coercive by its very nature. Its first duty is to compel obedience to its mandates. A government that is not obeyed is no government at all. This coercive power comes from society; whenever it is necessary government has the right, and is in duty bound, to summon to its aid all the powers that society possesses to secure its ends. This it does in the name of society and for its defense.

7. Politics Defined.—Politics, or Political Science, relates to the principles of government. It is the same thing as the science of government. It is also the same thing as political philosophy, unless indeed we conceive of political philosophy as dealing with

the more speculative and theoretical aspect of politics. In its broadest scope, this science is a view of society considered under its governmental aspects. Sir Frederick Pollock says its field comes into view when, passing by such related sciences as political economy and ethics, "we come to consider man, not only as a member of society, but as a member of some particular society, organized in a particular way, and exercising supreme authority over its members; in other words, when we consider man as a citizen, and the citizen in his relations to the state." He mentions as the natural heads of this science, "the foundation and general constitution of the state," "the form and administration of government," "the principles and method of legislation," and the "state as a single and complete unit of a high order, capable of definite relations to other like units."[1]

The present treatise will not deal with the science of politics as thus outlined. It is not a general contribution to political philosophy. It deals with a specific and concrete theme rather than with a general and abstract one. Nevertheless, it will conduce to clearness and strength of treatment to devote the preliminary pages to defining the leading terms of the science.

III. The State and the Nation.

8. The State.—Mr. Wheaton, following Cicero and most modern jurists, defines a state as a "body politic, or society of men united together for the purpose of promoting their mutual advantage by their combined strength."[2] Professor Burgess says it is "a particular portion of mankind viewed as an organized unit."[3] Such a society occupies its own territory and is called sovereign. Mr. Wheaton remarks that this definition excludes all corporations, both public and private, that the state itself creates, such as the London and Plymouth Companies, to be mentioned hereafter. It excludes all voluntary associations of robbers and pirates, and all hordes of wandering savages not yet formed into a settled society. The definition also excludes the States of the American Union, because they are not sovereigns in the sense of international law. The United States, France, Germany, and Russia are states in that sense.

9. The Nation.—By its etymology the term nation belongs to the science of ethnology rather than to the science of politics. It comes from the Latin verb *nascor*, to be born, and has primary refer-

[1] Page 8.
[2] Part I., Chap. II.
[3] Vol. I., p. 50.

ence to birth or race kinship. In this view a nation is properly one people, having a common ancestry and descent, a common language, common traditions, manners, civilization, and customs. It also suggests a common home, present or past, from which, however, portions of the nation, or even the whole nation, may have emigrated. But nation has become a political word, and this we may call its secondary meaning. In this sense the state and the nation are the same thing. It is good usage, therefore, to call the Germans or the Poles a nation although they are found in a number of states, and to call the Jews or the Gypsies a nation, although scattered over the world; and it is equally good usage to say that the British state, the Austrian state, or the Russian state, comprises a great number of nations. This is the ethnological sense of the word. It is equally good usage to call the three states just mentioned, as units, nations. This is the political sense of the word, and in this sense it will generally be used in the present work. In Germany the tendency is to confine nation to its original meaning; but in English-speaking countries the secondary meaning is too firmly established to be disturbed. In recent times there has been a strong tendency to make nationality, in the primal sense, or race kinship, the basis of the state. Examples are seen in the efforts to realize national unity met with in the history of Germany and Italy since the downfall of Napoleon, and also in the Balkan Peninsula. There is still another, and a less definite, meaning of nation. Before the Declaration of Independence the Thirteen Colonies were not uncommonly called a nation, but never a state; and the Dominion of Canada might be so called to-day. Here the bonds of unity appear to be race kinship and common interests, the emphasis being thrown upon the latter element.

10. **The State and the Government.**—It is important to observe that the state is one thing, the government quite another. The state is the corporate people; the government, a system of agents and powers that the people have either organized, or permitted to be organized, to carry on the public functions of society. Therefore, government is not an end but a means. This doctrine, which was explicitly taught by Aristotle, has not been better stated than by Dante:

"And the aim of such rightful commonwealths is liberty, to wit, that men may live for their own sake. For citizens are not for the sake of the consuls, nor a nation for the king; but contrariwise the consuls are for the sake of the citizens, the king for the sake of the nation. For as a commonwealth is not subordinate to laws, but laws to the commonwealth; so men who live according to the law are not for the service of the lawgiver, but he for theirs; which is

the philosopher's [Plato's] opinion in that which he hath left us concerning the present matter. Hence it is plain also that though a consul or king in regard of means be the lords of others, yet in regard of the end they are the servants of others; and most of all, the monarch, who, without doubt, is to be deemed the servant of all."[1]

11. **Sovereignty.**—In defining the state the much-used word sovereignty has been employed. In every independent society, such as a state, there must be some authority from which the whole law and administration ultimately proceed. This authority is sovereignty, and the person or persons who wield it are called the sovereign or sovereigns. The following particulars are essential to a full understanding of the subject:

1. Sovereignty is unlimited power over the individual member of the state and all associations of members. This is sometimes denied as savoring of despotism. The difficulty lies in the fact that men do not carefully distinguish between the state and the government. For example, the people of the United States, in their constitutions, have delegated certain powers to their governments, National and State; their governments are, therefore, relative and limited governments. But, plainly, the power of the people of the United States to change these governments to please themselves is absolute and unlimited. The discussion of this topic will be renewed when we come to discuss the relations of the American States to the Union.

2. As sovereignty makes the law, it is necessarily superior to it and cannot be bound by it. It is not, however, higher than duty or moral obligation.

3. In the absolute sense, sovereignty cannot be divided; the very supposition implies two highest, or sovereign, authorities in the state, which is impossible. Still, the sovereign authority may delegate certain powers to one government and certain other powers to another, as is done in the United States; but this is not dividing the ultimate supreme power which resides in the people.

4. Sovereignty may vest in one person, in the few, or in the many, according to the nature of the state. In a democratic state, like the United States, it is vested in the many—that is, in the people or the nation.

IV. Theories of the State.

12. **Historical Theory.**—The true account of the origin of the state is that given by Aristotle, which may be thus summarized: Man cannot exist in solitude; the union of the two sexes is neces-

[1] Quoted by Pollock, pp. 37, 38.

sary for the perpetuation of the race, and to its proper direction and guidance. The relations of husband and wife, parent and child, master and servant, determine the household or family. Families coming together form the village or tribe, and a union of tribes, or the expansion of the single tribe, forms the state. The units of the family are individuals, the units of the tribe are families, the units of the state are tribes or villages. The family is the first step, the tribe the second step, and the state the last step in social development. Man becomes perfect only in the state. The state is not the result of agreement, contract, or convention among men; it is an organic development, and so, perfectly natural. It is imposed on man by the conditions of his highest life; it is the only condition in which he can achieve all that he is capable of achieving. Hence the maxim, "Man is born to be a citizen." The state differs from the family and the tribe, therefore, in the number of its members, and in the number and nature of their relations.

13. **Patriarchal Societies.**—Family and tribal societies are called patriarchal societies, their governments patriarchal governments. Such societies well illustrate a certain stage in the development of the state, or of civil society. The first two syllables of the word patriarchal mean *father,* the second two *government;* so that, in the original sense, patriarchal government is government by a father. It is applied to tribes as well as families, because the original rulers of the tribe were the fathers of the oldest family. It is a form of government well adapted to the purposes of the tribe, but will not answer the purposes of a large and progressive society. Accordingly, we find patriarchal government in the savage or half-civilized states of society, although not to the exclusion of other forms in the half-civilized state, but we never find it in civilized societies. They have outgrown it. But human society, at some stage of its progress, universally presents this type of social organization. We have an excellent example of a patriarchal ruler in Abraham, and of the development of a patriarchal tribe into a nation and a state in his descendants, as narrated in the Book of Genesis. The same history is also a good example of the manner in which early states were formed.

14. **Theory of Contract.**—Once it was the fashion to say that the state is an artificial product or mechanism. Those who held this doctrine reasoned that at first there was no society or government. Men lived in a free, natural condition, every one doing what he pleased. In this condition they enjoyed a great many rights and privileges that they could not enjoy when they came to live together in society. For example, men living alone in the forest, or in small numbers, could safely do a great many things that they could not do

living in a town or city. But living in this way, men suffered the want of those advantages that spring out of society and government. Hence, they agreed to enter into society, and to constitute government. According to this agreement, they surrendered those natural rights that would bring them into conflict with one another, they established certain rules of conduct, and appointed officers to enforce these rules. The most celebrated defense of this theory is Rousseau's *Social Contract*.[1]

15. **Refutation of this Theory.**—The truth is, no such contract as this was ever entered into by men, either directly or indirectly. Men live together just as naturally as birds pair and gather into flocks, or as bees live in swarms; and government is a natural and necessary outgrowth of this condition. Thus, society and government, although very simple at first, have existed from the time that the first man and the first woman formed the first family. The first child was born into a community already existing, and he became subject to an authority that he had had no part in creating or administering. And so it is now; children are born into society, and are subject to government from the time that they draw their first breath. As they grow up, they continue members of society; they may or they may not assist in carrying on the government; but they never have anything to do with creating the society into which they are born, or with originating its government. No man is ever invited to enter society; no man ever enters it of his own accord; no man is ever asked whether he will become a subject of government; no man ever becomes such of his own choice. A man may choose to live in *this* society rather than in *that* one, or to be subject to one government rather than to another; but he must live in some society, and so be under some government, unless, indeed, he become a hermit. Hence the rule, that a man is bound to render obedience to the government under which he lives.

But still more, men could not come together and frame a social compact unless society, government, and the state already existed. Compacts in plenty are found in political history, but they belong to a considerably advanced stage of social and political progress, and never to its beginning. Thus, compact assumes the very fact that it seeks to explain.

16. **Theological Theory.**—The theological theory regards the state as the immediate workmanship of God. The New Testament says government is an ordinance of God, and makes it a divine institution. But this language cannot mean that the Divine Being directly created the particular governments that now exist, or that

---

[1] See Pollock, pp. 65-92.

have existed. Government is divine in the sense that marriage, the family, children, society, and the state are divine; it is a necessary condition of the existence of the human race. God ordained society, government, and the state when He gave man his social nature.

V. Kinds of Government.

17. Aristotle's Division of Governments.—Apparently the first scientific division of governments was that made by Aristotle, into the monarchy, the democracy, and the aristocracy. This division has been much criticised but generally followed; its general acceptance attests its excellence. Plainly, the three names all have reference to the vesting of authority or to sovereignty; in other words, they simply tell us who holds political power, but tell us nothing as to the nature of governments as determined by the ends to which they are directed, that is, whether they are good or bad. The fact is, governments may be divided in several ways that throw light on their nature, according as we adopt different ideas or standpoints for our division. Aristotle's division is, the One, the Many, the Few.

18. Monarchy.—Monarchy is government by one man, or a monarch. A large number of persons may be employed in carrying on the government, but they do so in the name and by the authority of the monarch. Monarchical governments are more numerous in history than all other governments put together. It is common to divide them into limited and unlimited monarchies, according as the power of the monarch is or is not limited by a constitution. As a matter of fact, every monarch is limited by the national genius and by popular feeling.

19. Democracy.—Democracy is government by the many, or the people. The people, or so many as participate in public affairs, come together at one place to enact laws, to settle questions of public policy, and to choose officers to carry out their will. Athens was a democracy in ancient times, and so was the Plymouth Colony for a brief period in modern times. But such a government is adapted only to small societies and to narrow territories. The Athenians could meet in Athens to pass upon public questions, and the Pilgrims in Plymouth for the same purpose; but the English could not in this way govern the British Empire from London, or the Americans America from Washington. This is one of the reasons why pure democracies have been few in number.

20. Aristocracy.—In an aristocracy, power is not intrusted to one, as in a monarchy, or to the many, as in a democracy, but is confined to a few persons of superior birth and position. Pure aristocracies have been few. Venice had such a government. The word aristocracy means government by the best or the few.

21. Mixed Governments.—Many governments contain a variety of elements, and so are really mixed governments. England is a good example. The monarch reigns by hereditary right; the House of Lords, consisting of the heads of the great families, is an hereditary aristocratic body; while the House of Commons, which is the most powerful factor, is chosen by the people and is a republican body. The same is true in a less degree of Germany.

22. Immediate and Representative Governments.—Governments may be divided with reference to the identity or non-identity of the government with the sovereign power. If the two are identical, the government is immediate or direct; if they are not identical, the government is representative or indirect. Evidently, immediate government is the simpler and the more readily understood of the two.

23. Representative Government.—The principle of political representation was practically unknown to the ancient world. Says Mr. Fiske: "No statesman of antiquity, either in Greece or at Rome, seems to have conceived the idea of a city sending delegates armed with plenary powers to represent its interests in a general legislative assembly. . . . In an aristocratic Greek city, like Sparta, all the members of the ruling class met together and voted in the assembly; in a democratic city, like Athens, all the free citizens met and voted; in each case the assembly was primary and not representative."[1] The German mind is entitled to the credit of inventing representative government, to which political progress in modern times is more largely due than to all other political causes put together.

24. The Republic.—The people of a republic govern themselves by means of chosen men whom they call representatives. Republicanism is government by the people in an indirect sense, and is sometimes called democratic. President Lincoln called it "Government of the people, by the people, and for the people." The United States is a democratic republic. The word means the public weal, the commonwealth. In antiquity and the middle ages, a republic was a government of any kind without an hereditary monarch at its head. The so-called republics and democracies of antiquity and the middle ages were not such according to modern ideas. To quote Sir F. Pollock: "After all, the citizens for whose welfare Aristotle conceived the state to exist were, even in the most democratic of constitutions, a limited and privileged class. They are people of leisure and culture, not living by the work of their hands. To make a true citizen of the worker in mechanical arts, the handicraftsman who has not leisure, is thought by Aristotle a hopeless task, and

[1] Pages 59, 71.

this even with reference to the skilled and finer kinds of work. The grosser kind of labor is assumed to be done by slaves, who are wholly outside the sphere of political right. Not that Aristotle would neglect the welfare of inferior freemen or even of slaves. He would have the statesman make them comfortable, and bring them as near happiness as their condition admits. But of happiness in the true sense they are incapable."[1]

25. Centralized and Dual Governments.—Another principle of division of governments has reference to the consolidation or distribution of political powers. In centralized governments, authority is lodged in a single organization, as in England and France. Local government may exist, but only as the creature of the central government, by which it can be changed or set aside. In dual governments, the state delegates certain powers to one organization and certain other powers to a second one. The two may be strictly coördinate, and so independent in their different spheres; or one may be dependent upon the other; or, if they are independent, one may employ the other as an agency.

26. Forms of Dual Government.—Writers differ in the number of forms of dual government that they recognize. Only two call for mention in this place, viz.: confederate government and federal government; or, as the Germans call them, the *Statenbund* and the *Bundesstaat*. Both of these forms are illustrated by the United States at different periods of their history, as we shall see hereafter.

A confederate government is the creation of the several local governments or states, rather than of the nation; it represents those governments and not the people; and it acts upon them and through them, and not upon the nation directly. For example, if it needs money to fill its treasury or men to recruit its army, it calls upon the states for the needed supplies and the states respond in their own way. Sovereignty resides in the states, and not in the one people. A federal government, on the other hand, is the creation of the nation; it acts directly upon the people and not indirectly through the states; it employs its own agencies and not those of the states, and it is commonly much better developed in all respects. While a legislative council or congress may serve the purposes of a confederacy, only a fully differentiated system—legislative, executive, and judicial branches—will serve the purposes of an efficient federal state. Plainly, sovereignty is here vested in the one people or nation. Our study of the American Government will give us the best opportunity that history affords to illustrate these two forms of political dualism.

[1] Page 28.

27. Federal Government.—The relations of the local and general governments in a federal state may be thus summarized:

On the one hand, each member of the union is wholly independent in those matters which concern itself only; on the other hand, all members are subject to a common authority in those matters which concern the whole body collectively. Thus, each member fixes for itself its laws, and even the details of its political constitution, not as a matter of privilege or concession, but as a matter of right, as an independent commonwealth; while in all matters concerning the general body, the several members have no power whatever. Each member is perfectly independent within the local sphere; but in the national sphere its independence, or rather its separate existence, vanishes. It is invested with every right and power on one class of subjects; on another class, it is as incapable of separate political action as any province or city of a monarchy or of a unitary republic. Peace and war, and, generally, all that comes within the sphere of international law, is reserved wholly to the central power; foreign nations know nothing of the states, and deal only with the general government. A federal union forms one state or power in relation to other powers, but many states in relation to internal administration.[1]

28. The Advantages of Centralized and Dual Governments.—Each of these governmental forms has its own peculiar advantages. A centralized or unitary government secures greater internal peace, and diminishes faction, party strife, and local prejudice, as well as enhances immunity from the evils of war, both domestic and foreign. A federal government secures greater local freedom, more intense patriotism, and higher political education. We Americans claim that our federal system measurably secures the peculiar advantages that have been claimed for large and small states,—local autonomy and national power. We hold that in an extended empire, like our own, local independence is as essential to freedom as centralized power is to peace and security.

29. Civil Government.—The word civil is used in a variety of senses. Sometimes it is used in a sense so broad as to make civil government and government the same thing. But the word is derived from the Latin *civis*, meaning citizen, which again is related to *civitas*, meaning state; and we commonly limit it to those more advanced social conditions in which proper states are found. Roving savages are not citizens, because they do not constitute a state. In the proper sense, civil society and civilized society are the same thing. Civil government is the government of the state, and is coextensive with civil society. It is a government of regular and set-

[1] See Freeman, *History of Federal Government*, Chap. I.

tled order. In the best sense, it is a government of laws resting upon intelligence and moral force. It is discriminated from military government, which is government by the army, and also from the government of savage tribes.

30. **Civil and Political Rights.**—Definitions of rights are both numerous and conflicting. The ideas that the term conveys change with intellectual, social, and political conditions. A Chinese cannot understand it as the Greek understood it; nor do men living under absolute governments, as Russia, know what it means to the people of the United States. A general discussion of the subject is not here called for, but two species of rights that are often confounded must be carefully discriminated.

The use of the common highways, the protection of person and property, the pursuit of whatever trade or calling one sees fit to follow, are civil rights. Participation in the government, as in voting and holding office, are political rights. The civil rights, and still more the political rights, enjoyed by men differ greatly in different countries. As a rule, the freer the government the larger the measure of rights possessed by the citizen or the subject. These two classes of rights are by no means accorded to men in the same country in equal measure. The citizen may enjoy full civil rights and have no political rights whatever; or he may enjoy full political rights while his civil rights are not well protected. That is, his rights of person and property may be protected, while he is denied all participation in the government; or he may participate freely in the government, while not enjoying civil protection. Civil and political rights are defined and protected by law in all well-ordered states.

31. **Civil and Political Liberty.**—Strictly speaking, civil liberty pertains to the enjoyment of civil rights; political liberty, to participation in politics or the affairs of government. Some writers blend them in one whole. Dr. Lieber says that "when the term civil liberty is used there is now always meant a high degree of mutually guaranteed protection against interference with interests and rights held dear and important by all classes of civilized men," and also "an effectual share in the making and administration of the laws as the best apparatus to secure that protection."[1] In other words, Dr. Lieber holds that political liberty is essential to civil liberty, and that practically the two kinds of rights cannot be separated.

VI. Constitutions.

32. **Kinds of Constitutions.**—Theoretical writers recognize two or more kinds of constitutions. Dr. Brownson calls one kind "constitutions of the people," another kind "constitutions of the gov-

[1] Page 89.

ernment." Judge Jameson calls them "constitutions as objective facts" and "constitutions as instruments of evidence." This distinction further illustrates the difference between society and government, the state and the political system. Constitutions "as they ought to be" are ideal constructions, like Plato's Republic and More's Utopia.

33. **The Constitution of the People.**—Jameson calls the constitution of the people "its make-up as a political organism; that special adjustment of instrumentalities, powers, and functions, by which its form and operation are determined." This constitution is a part of the political character and life of the people. It is the constitution actually existing and working at any given time. It is never summed up in a document. It grows up with the state, and is not made or ordained. It changes as the people change.

34. **The Constitution of the Government.**—Dr. Brownson defines the constitution of the government as "simply a law ordained by the nation or people, instituting and organizing their government." Jameson says it is "the result of an attempt to represent in technical language some particular constitution existing as an objective fact."[1] Commonly this secondary constitution is in general accord with the primary one, but it always varies from it more or less widely. The constitution of the people of the United States says that the President and Vice President are elected by the people voting by States; the constitution of the government says they are elected by electors appointed as the several State legislatures may direct. Our caucus system is a part of the one, but not a part of the other.

35. **Constitutional Governments.**—Every nation has a constitution considered as an objective fact, or a constitution of the people. But only those governments are called constitutional that are instituted and organized by some rules or statutes of binding force called constitutions. These constitutions may, in whole or in part, be the immediate concessions or grants of a king, as *Magna Charta* was, but this is rarely the case unless they are sternly demanded by the state. The object of constitutions is to institute political power, and to define and limit its extent. Constitutions are of two kinds, written and unwritten.

36. **Written Constitutions.**—The main difference between such a constitution and an ordinary law is that a constitution is ordained by the state, or sovereign power, for the purpose of instituting the government, defining its powers and directing by whom they shall be exercised; while a law is enacted by the law-making power that the constitution has instituted, as a congress or a legislature. Such

[1] Chap. III.

a constitution is also called an organic act and the fundamental law. It is therefore a much more significant and solemn act than a common statute. A written constitution may be composed of old materials, and will be so to a large extent if it is a good one; but it is always a definite act or transaction, an attempt to formulate the organic law. It is always a document, *lex scripta.*

37. **Unwritten Constitutions.**—Unwritten constitutions grow up gradually, springing out of the life of the state. They consist of customs, precedents, traditions, grants of rights by the executive authority, rules of proceeding by the legislature, and decisions by the courts of law. Such constitutions are never found in a formal document, and so are called unwritten, *lex non scripta.* They are sometimes called prescriptive, historical, and traditionary constitutions. The most celebrated constitution of this kind is that of England. According to this constitution, sovereignty resides, *pro forma,* in Parliament, which enacts such laws as it pleases, and may at any time change the constitution itself, even to the extent of abolishing the Crown. This constitution consists of documents and precedents which are found in books of law and history.

38. **Advantages of the Two Kinds of Constitutions.**—Each kind has its own points of advantage and disadvantage. Unwritten constitutions are more elastic, more rapidly changed, and they more nearly represent the constitution of the people. Written constitutions are more definite, are less open to dispute, are more readily understood and followed. They are bulwarks against faction and violence, and against abuses of power. They are monuments from which we may measure the advance or recession of the body politic. An unwritten constitution of necessity lodges sovereignty in the government, or some branch of it, as the English constitution does in Parliament; while a written constitution always assumes that there is a power above the government—the people, or the nation—that makes and changes the constitution at will. The question, Which is the better? must be answered with reference to the history and political character of the people directly interested in a particular case.

VII. Modes of Improving Government.

39. **Evolution.**—Some governments are more and some less imperfect, but all are capable of improvement. The common mode of improving them is through public opinion. Interested men agitate reforms in newspapers, books, pamphlets, sermons, speeches, and private conversation, until, at last, public sentiment declares itself satisfied with the existing state of affairs or compels a change. This is the civilized way of reforming government, and in free countries

these processes are all the time going on. It is a slow but, under favorable circumstances, an effectual, mode of accomplishing the end.

40. Revolution.—The Declaration of Independence describes another mode of effecting political changes. "Whenever any form of government becomes destructive of these ends [viz., the securing of rights] it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." This is called the right of revolution. It is an extreme and violent measure even when peaceful, and still more so when it is effected by war and bloodshed. Accordingly the Declaration says: "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes. . . . But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them [the people] under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new safeguards for their future security."

PART I.

THE MAKING OF THE AMERICAN GOVERNMENT.

CHAPTER I.

THE THIRTEEN ENGLISH COLONIES PLANTED.

REFERENCES.[1]

I. GENERAL HISTORIES.—Bancroft, *History of the U. S.* (author's final revision), Part I.; Hildreth, *History of the U. S.*, Vol. I.; Winsor, *Narrative and Critical History of America*, Vol. III.; Johnston, *The United States.* See also the same author's articles on the Thirteen Colonies, by names, in *Lalor's Cyclopædia of Political Science, etc.*

II. SPECIAL HISTORIES.—Doyle, *The English Colonies in America*, I., "Virginia, Maryland, and the Carolinas"; II. and III., "The Puritan Colonies"; Lodge, *A Short History of the English Colonies in America;* Fiske, *The Beginnings of New England;* Hinsdale, *The Old Northwest*, Chaps. VI., VII., and *How to Study and Teach History*, Chaps. XV.–XVII.; Thwaites, *The Colonies* (*Epochs of American History*). See also the volumes on *Connecticut, New York, Maryland,* and *Virginia* in the *American Commonwealths* series.

III. ON RIGHT OF DISCOVERY.—Phillimore, *Commentaries upon International Law*, Part III., Chap. XII.; Wheaton, *Elements of International Law*, Part II., Chap. IV.; Wharton, *Digest of the International Law of the U. S.*, Chap. I., Sec. 2.

IV. COLONIAL CHARTERS AND PATENTS.—These are nearly all given by Poore, *Federal and State Constitutions, Colonial Charters, etc.*, and several of the principal ones by Preston, *Documents Illustrative of American History.*

[1] Titles of books once given will not ordinarily be repeated in these bibliographies, save when necessary to avoid confusion. A bibliographical index will be found at the close of the work.

41. **The Right of Discovery.**—Columbus and his successors made known to Europe the continent of North America. These vast regions, Spain, England, and France divided among themselves. The Right of Discovery, as the rule was called by which this division was made, embraced, when fully developed, these ideas: (1) The Christian nation that discovers a heathen land owns it to the exclusion of all other Christian nations; (2) This nation, to complete its title, must, within a reasonable time, occupy and use this land; (3) The native inhabitants are only the occupants of the land and not its owners. Lands that a Christian power thus appropriated were vested in the king as its representative. This, in the case of England, it is important to remember; for the American Revolution hinged upon the fact.

42. **First Division of North America.**—In the years 1512-1540 Spanish navigators discovered the southern parts of the United States bordering on the Gulf of Mexico, including Florida. In 1497-98 John Cabot, a Venetian adventurer, who had made his home some time before at Bristol, England, sailing with a commission given him by Henry VII. of that country, first discovered the continent, and sailed along its eastern shore from a high latitude to Chesapeake Bay. In 1534, 1535, and 1540, Jacques Cartier, a French navigator, sailing under the flag of the King of France, discovered the Gulf and River St. Lawrence and the valley that these waters drain. These discoveries gave Spain the southern, England the central, and France the northern parts of North America, and at the same time left many disputes as to claims and boundary lines to be afterwards settled by negotiation and the sword. The three powers proceeded at their own time and in their own way to found colonies in their new dominions.

43. **London and Plymouth Companies.**—England was slow to begin colonization, and even then her first efforts proved disastrous failures. But in 1606, King James I., by one charter, created the London and Plymouth Companies,

and divided his American dominions between them. To the London Company, which had its headquarters in London, he assigned the zone between 34° and 41° north latitude, and to the Plymouth Company, having its seat in Plymouth, the zone between 38° and 45°. Within their respective limits, the companies were authorized to establish colonies of the king's subjects, care being taken to prevent disputes within the three-degree strip covered by both grants, by prohibiting either one to make a settlement within one hundred miles of one previously made by the other. Each colony was to be subject to the king, and to be governed by a local council of its company in England, at the king's pleasure. It was expected in 1606 that there would be but two colonies, or at the most but two groups of colonies, but this expectation failed, and in the end thirteen colonies, divided into three groups, appeared. The two companies were short-lived, and yet they played important parts in American history. Other companies appeared on the scene, but none so prominently as these two original ones.

44. Colonies Planted by Companies.—The colonies of Massachusetts, New York, New Jersey, Virginia, and Georgia were planted by mercantile corporations clothed with political powers. Such companies played a great part in the days when the maritime nations of Europe were establishing themselves in America and in the other countries discovered by the navigators of the fifteenth and sixteenth centuries. The stockholders were merchants, politicians, adventurers, courtiers, patriots, reformers, and philanthropists — two or more of these characters often appearing in the same man. Their motives are sufficiently suggested by the names applied to them. Few of the stockholders became colonists. The Massachusetts Bay Company was the only one that was merged in the colony that it planted.

45. Colonies Planted by Proprietors.—New Hampshire, Pennsylvania, Delaware, Maryland, and the two Carolinas, were planted by proprietors. New York and New

Jersey, too, although planted by a Dutch company, were for a time following 1665 proprietary colonies. The proprietors were actuated by the same motives as the stockholders of the companies, and more or less by personal ambition into the bargain. They were really sub-kings of their several provinces, and could depute their powers to subordinates. They commonly remained in England, committing their executive functions to governors, but they occasionally came to America and governed in person for a time.

46. **Voluntary Colonies.**—Plymouth (later merged with Massachusetts), Connecticut, and Rhode Island were not planted by companies or proprietors. They were rather founded by groups of individuals, not bound together by charters or by articles of incorporation, but only by moral bonds. The founders and the colonists were the same persons. They were not at first recognized by the crown, much less supported, and Plymouth never obtained such recognition. In no other colonies were cherished civil and religious ideas so powerful a motive as in these.

47. **Agency of the Home Government.**—The agency of the home government was limited to three things: (1) grants of lands; (2) grants of commercial privileges; (3) grants of civil rights and political powers. The government did not found a single colony. Generally, the crown required some compensation for its grants, a price for the lands in the case of the grant to Penn, but commonly a rent or a share in the profits of the enterprise. Profits, however, there were none, and rents were small. England, in the long run, derived great commercial advantages from her colonies; but the original founders commonly lost the money that they embarked in them. Many of the companies and proprietors surrendered their charters to the crown. It is important to note that the Thirteen Colonies were not the creatures of government or the children of patronage, but the results of private enterprise and public spirit; for the fact had much to do with the development of the Colonial character.

48. Classes of Colonists.—There were more classes of colonists than classes of colonies. Some men were moved by the love of adventure; some came out indentured for a term of years to the company or proprietor that paid their passage money; a few were criminals, who chose emigration rather than confinement in prison. All, or nearly all, sought to better their material condition in life. Many sought civil, political, or religious liberty. There was some admixture of nationalities from the first. In the Southern and Northern groups, few or none but Englishmen were found; but in the Middle group, there were also Dutch, Swedes, and Germans. Later, there was an infusion of Scotch, Irish, and French blood. Still, at the beginning of the eighteenth century the population was largely homogeneous. Taken together, the American emigration was of an excellent quality throughout. It was said of New England: "God sifted a whole nation that He might send choice grain out into this wilderness."

49. Ideas of the English Colonists.—English colonial ideas can best be presented by putting them in contrast with the ideas of the Spanish and French colonists.

The Spaniards sought in the New World adventure, dominion, and, above all else, gold and silver. Some stress they also laid on the evangelization of the Indians. The French ideas were discovery and exploration, the fur trade, the conversion of the Indians, and the enhancement of the glory of France. Neither the Spanish nor the French colonists brought with them new ideas to plant in new soil; neither sought civil, political, or religious rights; neither longed for better government or a freer church; neither cared anything or knew anything of the passion for social improvement that was so powerful a factor at the time in England and in the English colonies. The English colonists were by no means destitute of the qualities that characterized their neighbors, but their master-ideas were industrial, political, and religious. They pursued agriculture, the fisheries, and commerce; they sought their fortunes in the

field and shop and on the sea, rather than in the forest or in mines of precious metals; they were more interested in establishing states and churches where they could be free, than in converting the savages. The communities that they planted throbbed with industrial and commercial, civil and political life. Accordingly, the English colonies, if less romantic, chivalrous, and picturesque than the Spanish and French colonies, were more practical, more modern, more in harmony with the great forces of our present civilization.

The colonizing impulse that originated in the reign of Queen Elizabeth, and that led to the colonies of Virginia and New England, was due in great part to the desire on the part of that sovereign and her advisers to limit the power of Spain in the New World, and to promote the expansion of England and the Protestant religion.[1]

50. **The Rights of Englishmen.**—The charter of 1606 contained a guarantee, forever irrevocable, unless by consent of both parties, that became the great bulwark of colonial rights and liberties in the contests of a later day. The king said:

"Also, we do, for us, our heirs, and successors, declare, by these presents, that all and every the persons being our subjects, which shall dwell and inhabit within every and any of the said several colonies and plantations, and every of their children and posterity, which shall happen to be born within any of the limits and precincts of the said colonies and plantations, thereof, shall have and enjoy all liberties, franchises and immunities of free denizens and natural subjects within any of our other dominions, to all intents and purposes, as if they had been abiding and born within this our realm of England, or in any other of our dominions."

In after times this pledge was sometimes called the Colonial Constitution. It was also repeated in later charters. The several colonies will now be described more in detail.

---

[1] See Brown, *The Genesis of the U. S.*, Introductory Sketch.

I. The Southern Colonies.

51. **Virginia.**—The political history of the United States begins with the founding of Jamestown, Virginia, by the London Company in 1607. The charter, which was renewed and somewhat changed in 1609 and 1612, gave the people no voice whatever in the government of the colony; they were wholly subject to the company and to the king, and there was much dissatisfaction and murmuring in consequence. The first concession to popular rights was made in 1619, when Governor Yeardley, in order that the planters might have a hand in governing themselves, called upon them to choose representatives to a legislative assembly. This assembly, called the House of Burgesses, was the first legislative body that sat in America. Two years later, the company issued an ordinance creating a General Assembly, consisting of a Council of State appointed by the company, and the Burgesses chosen by the people. This colonial legislature was authorized to make general laws and orders for the behalf of said colony and the good government thereof; provided, however, that no such law or order should continue in force unless ratified by the company. In 1624 the Court of King's Bench declared the charter forfeited to the crown, and Virginia became a royal colony. This, however, did not change the constitution of 1619 and 1621.

52. **Maryland.**—In 1632, Charles I. gave the two peninsulas lying on the ocean, Chesapeake Bay, and Potomac River, save the tip of the outer one, to George Calvert, Lord Baltimore. The grant was bounded north by the fortieth parallel. The charter gave Calvert the soil in full and absolute propriety, authorized him to plant a colony to be called Maryland, and empowered him to make laws for the government of the colony with the consent of the freemen. Calvert dying, his son Cecilius, who succeeded to the title, planted the colony in 1634. Except the period 1688–1716, when the crown usurped the appointment of the governors, the charter continued in force until 1771. The provision that compelled the proprietary to consult the freemen in making the laws, secured to them from the first a voice in the government, and finally a representative assembly.

53. **The Carolinas.**—By two charters, bearing the dates of 1663 and 1665, Charles II. gave the territory lying between 29° and 36° 30′, from sea to sea, to eight lords proprietors. These proprietors were authorized to make plantations, to enact laws with the consent of the freemen of the colony, and to appoint governors. In time, two groups of settlements were made; one on the shore of Albemarle Sound, and the other south of Cape Fear River. In 1729 the proprietors surrendered to the crown their charter and province, which two years later was divided into the two royal colonies of North Carolina and South Carolina.

54. **Georgia.**—In 1732 George II. created a company that he styled "Trustees for establishing the Colony of Georgia in America," having the following objects: To strengthen the province of Carolina by creating a new one between it and the Spaniards and Indians; to provide a refuge for poor debtors in England; to open an asylum for the persecuted Protestants in Europe, and to promote the Christianization and civilization of the Indians. The territory assigned the company lay between the Savannah and Altamaha Rivers. For twenty-one years the trustees should make laws and appoint governors for the ruling of the colony. The first settlement was made at Savannah in 1733. The trustees gave up their charter in 1751, and Georgia then took her place among the royal colonies.

II. The Northern Colonies.

55. **The Plymouth Company.**—This company was less vigorous than its London rival. Its attempt to found a colony on the coast of Maine was defeated. So the king, in 1620, gave it a new charter, with larger powers. This charter covered the zone lying between 40° and 48°, from ocean to ocean, to which it gave the name of New England. The Council at Plymouth, as the board of directors was called, now took a more active part in American affairs. It never founded colonies itself, but it granted lands to those who did found them. After disposing of the whole New England shore, the company, in 1635, surrendered its charter to the king and ceased to exist.

56. **Plymouth.**—The first permanent settlement in New England was Plymouth, made by the Pilgrims in 1620. At first these seekers after religious freedom were intruders on the territory of the Plymouth Company, for they had no grant of lands; but in 1621 the Council made them a grant, which, however, it did not bound or locate, and authorized them to set up a government. In 1629 the Council gave them a fuller charter; still, as no charter of government was considered valid unless approved by the crown, and as the crown withheld its approval, the government of Plymouth was in this respect irregular and unauthorized.

57. **The Plymouth Compact.**—Just before the Pilgrims landed at Plymouth, all the adult males of the company, forty-one in number, signed a compact, under which was carried on for several years a purely democratic government. The freemen, or rather so many of them as were members of the Church, met in general assembly and enacted laws. In 1639 a representative body took the place of this popular legislature. From the beginning, the freemen elected the governor from among their own number. Down to 1691, when Plymouth was merged in Massachusetts, the colony continued a voluntary association.

58. Massachusetts.—In 1628 a number of English Puritans who were intent on planting a Puritan colony in New England, obtained from the Council at Plymouth a grant of lands bounded north and south by parallel lines drawn three miles north of Merrimac River, and three miles south of Charles River, extending from ocean to ocean. The next year King Charles II. gave them a charter confirming the grant and conveying to the grantees, who were styled "The Governor and Company of the Massachusetts Bay in New England," powers of government. What is called "the great emigration" was made in 1630. It was the royal intent that the company should remain in England; but it transferred itself, charter and all, to the shores of Massachusetts Bay, thus merging the company in the colony. At first, the assembly consisted of all the freemen, but a representative legislature was established in 1634. The freemen chose one of their number governor. In 1684 the king's judges in England declared the charter of 1629 forfeited, and the king attempted to make Massachusetts a royal colony; but the people resisted the attempt, and in 1691 the crown granted a second charter, less liberal, however, than the former one, which continued in force down to the Revolution. This charter merged Plymouth, New Hampshire, Maine, and Nova Scotia in Massachusetts; Nova Scotia and New Hampshire were soon detached; Maine continued a part of Massachusetts until it became a State in 1820, while Massachusetts and Plymouth were never again separated.

59. Connecticut.—Three groups of emigrants from Massachusetts, which they left because they could not carry out their civil and religious ideas in that colony, planted the same number of towns on the Connecticut River in the years 1634, 1635, and 1636. These towns united under one name in 1639 and adopted a constitution called "The Fundamental Orders of Connecticut." In 1639, also, New Haven and some other settlements on Long Island Sound united in one colony, under the name of New Haven. Neither one of these two colonies had, at first, a charter of government, or even a title to the lands it occupied other than the one obtained from the Indians; but in 1662 Charles II. granted a charter that merged the two colonies in one, defined its boundaries, and endowed it with the most liberal political powers. Save in the period 1685–1690, when it was temporarily set aside, this charter remained in force to the year 1818.

60. Rhode Island.—Rhode Island was also an offshoot from Massachusetts. Roger Williams with some refugees from that colony founded Providence in 1636, and another band of refugees, Rhode Island the year following. These plantations were the purely voluntary undertakings of private individuals. They had at first no

grants either of land or of political powers, but a series of charters, the last granted by Charles II. in 1663, united them under the name of Rhode Island and Providence Plantations, confirmed the colony in its narrow territory, and conferred upon it the most ample powers of government. Although temporarily suspended when James II. made his attack on the New England charters in 1685, the Rhode Island charter continued in force until 1842.

61. **New Hampshire.**—In 1622 the Council at Plymouth granted to Captain John Mason and Sir Ferdinando Gorges the territory between the Merrimac and Kennebec Rivers. On the division of this grant, that part lying west of the Piscataqua River fell to Mason, and this was afterwards confirmed to him by a charter given by the Council. Some feeble settlements were made about 1635, under the patronage of the proprietor. Massachusetts, however, claimed the territory under her charter of 1629; and for the most part the New Hampshire settlements were subject to her government until 1692, when New Hampshire became a royal colony.

III. The Middle Colonies.

62. **New York.**—Captain Henry Hudson discovered the Hudson River in 1609, and soon after the Dutch, in whose service he sailed, planted a settlement at its mouth. Extending their explorations east and south, the Dutch laid claim to the whole coast lying between the Connecticut and Delaware Rivers; and they ultimately took possession of New Jersey and Delaware, which had been occupied by the Swedes, as well as the valley of the Hudson. But England always claimed these territories, and in 1664 Charles II. gave them to his brother James, Duke of York. The royal duke at once dispatched an armed force to the mouth of the Hudson that compelled the Dutch governor to surrender all New Netherland, as the Dutch called their province. He now renamed it New York. It continued a proprietary colony until 1685, when on the accession of the duke to the throne of England, it became a royal colony. From that time the law-making power, subject to the crown, was vested in a governor and council appointed by the crown, and an assembly elected by the people.

63. **New Jersey.**—The Duke of York, on coming into possession of New Netherland, immediately granted that part of it lying between the Delaware River and the ocean to Lord Berkeley and Sir George Carteret as lords proprietors. At first there were two colonies, East and West Jersey; but in 1702, when the proprietors surrendered their rights to the crown, the Jerseys were reunited and became a royal colony. For a time, New Jersey had the same governor as New York, but it always had its own separate assembly.

64. Pennsylvania.—In 1681 Charles II. made William Penn a grant of the territory between parallels 39° and 42° north latitude, extending westward from the Delaware River five degrees of longitude. Pennsylvania was founded the next year. Penn, who was empowered by the charter to enact laws conformable to reason and the laws of England, with the consent of the freemen of the colony, pursued a liberal policy. He issued "frames of government," offering civil, political, and religious rights to such persons as should become settlers within his province. The charter of 1681 continued in force until the Revolution; then the State of Pennsylvania assumed all the political powers that belonged to Penn's descendants, and paid them a large sum of money for surrendering their property interests in the soil.

65. Delaware.—The territories composing the present State of Delaware lay within the grant made to Lord Baltimore in 1632, but it never became a part of Maryland. Some settlements that the Swedes had made, passed to the Dutch in 1655; these settlements, with some additional ones made by the Dutch, passed to the Duke of York in 1664; and then the country was sold by the Duke to William Penn in 1682. After much disputing, Lord Baltimore surrendered his claim. For a time it was a mere appendage of Pennsylvania; but after 1703, although having the same governor as that colony, it had its own independent assembly. And this state of things continued until Delaware became a State at the opening of the Revolution.

CHAPTER II.

HOW THE COLONIES WERE GOVERNED.

REFERENCES.

I. GENERAL BIBLIOGRAPHY.—Poore, *The Federal and State Constitutions, Colonial Charters, etc.;* Lalor, *Cyclopædia of Political Science, etc.,* articles on the several colonies; Chalmers's *Political Annals.*

II. HISTORIES OF THE UNITED STATES.—Bancroft, Vols. I., II. ("History of the U. S. as Colonies, in Three Parts"); Hildreth, Vols. I., II.; Winsor, Vols. III.–V.; Pitkin, *Political and Civil History of the U. S.,* Chaps. I.–V.; Thwaites, *The Colonies,* 24, 25; Johnston, *The U. S., History and Constitution,* I., II.; Hart, *Formation of the Union,* Chap. V.

III. SPECIAL WORKS.—Story, *Commentaries on the Constitution of the U. S.,* Book I.; Stevens, *Sources of the Constitution,* Chap. I.; Frothingham, *The Rise of the Republic,* Chaps. I.–IV.; Curtis, *History of the Constitution,* Book I., Chap. I.; Bryce, *The American Commonwealth,* Part I., Chaps. II., III.; Doyle, Lodge, and *American Commonwealths,* same as in previous chapter; Goldwin Smith, *The United States,* Chaps. I., II.; Wilson, *The State,* XI.

IV. LOCAL GOVERNMENT.—Howard, *Local Constitutional History of the U. S.,* particularly Part I.; Johns Hopkins, *Studies in Historical and Political Science, First Series* (many similar articles are also found in other series, as the *Second* and *Third*); Fiske, *The Beginnings of New England,* and *Civil Government in the U. S.*

V. GROWTH OF THE ENGLISH CONSTITUTION.—Stubbs, *The Constitutional History of England;* Freeman, *Growth of the English Constitution;* Taylor, *Origin and Growth of the English Constitution,* particularly Introduction ("English origin of the federal republic of the U. S."); Green, *The Making of England,* Chap. IV., and *History of the English People,* Books I.–IV.

66. The Three Classes of Colonies.—As we have seen in the last chapter, colonies frequently passed from one class to another. Still, the three original types were pre-

served throughout the colonial period. This is the grouping at the time of the Revolution:

1. Charter Colonies: Massachusetts, Connecticut, and Rhode Island. The charters were written documents guaranteeing to the people certain rights, and they may be compared to the State constitutions of the present day. They sprang, however, from the crown, and not from the people.

2. Proprietary Colonies: Pennsylvania and Delaware and Maryland. The proprietors, William Penn and Lord Baltimore and their descendants, held their provinces by patents emanating from the king, and these patents, together with the concessions of rights and privileges made to the people by the proprietors, had much the same effect as the New England charters.

3. Royal or Provincial Colonies: New Hampshire, New York, New Jersey, Virginia, North Carolina, South Carolina, and Georgia. The governors of these colonies, in conjunction with assemblies and councils, administered them in conformity with written instructions given them from time to time by the crown. No charter or patent stood between the colony and the king; at the same time, the various concessions that the crown made to the people, together with the customary mode of government, formed a traditionary constitution or charter.

67. **Common Political Features.**—While the thirteen colonies differed in constitutional features, they practically agreed in respect to governmental form, machinery, and administration. First, the sum total of powers and functions was distributed to local and to central institutions; secondly, the powers and functions distributed to each class of institutions were, in the main, the same; thirdly, the local institutions had certain general correspondences; and fourthly, the central governments conformed to one general type. These local and central institutions will now be briefly described. Of the first class, there were three types: the Town type, found in New England; the County type, found in the South; the Mixed type, found in the Middle States.

I. The Town Type.

68. The Puritan Ideas.—The English Puritans desired to diminish the consequence of the higher clergy in church government, and to increase that of the local pastors and of the lay membership. They also desired to add to the importance of the plain people in all matters of government. To carry out these ideas, was the main object sought by those Puritans who came to New England. Furthermore, the first to come came as church societies accompanied by their ministers, not as individuals. Moreover, they mainly belonged to the English middle class, which tended to foster a feeling of equality and to render society homogeneous.

69. The First Towns.—Such a church society, landing on the New England coast, would naturally make choice of some suitable spot where they could build a village or group of houses, and so all go to the same church. This they did, and continued to do as they moved westward. The first towns on the Connecticut River were founded by similar congregations migrating from Massachusetts. Such settlements were favored by the Massachusetts government, which made grants of land to similar societies wishing to live near together and attend one church. In later times, emigrations were sometimes made to the West in the same manner.

70. Influence of Physical Conditions.—Physical conditions tended strongly to develop the village feature of New England civilization. Large farms or plantations devoted to a single staple, as tobacco or rice, were an impossibility; the country admitted only of small farms and small farming. Then villages could be better defended against Indian attacks than scattered farms and houses. The rigor of the winter climate also drove the people together. Besides, the colonists interested themselves in commerce and fishing, and finally in manufacturing, as well as in agriculture; the coast was indented with natural harbors: and these circumstances favored compact societies and trading marts.

71. **Education and Schools.**—The founders of New England were educated as well as religious men. They believed thoroughly in schools and in education, and the school, as well as the church, tended to centralize the common life. The first school law of Massachusetts, enacted in 1647, ordered "that every township in this jurisdiction, after the Lord hath increased them to the number of fifty householders, shall then forthwith appoint one within their town to teach all such children as shall resort to him to write and read, ... ; also that, where any town shall increase to the number of one hundred householders, they shall set up a grammar school, the master thereof being able to instruct youth as far as they may be fitted for the university." A public school system was also established at an early day in Connecticut.

72. **The Old New England Town.**—The primal cell of the New England political organism was a reproduction of the English parish under the name of the town, and it presented both a civil and an ecclesiastical phase. As a civil organization, it regulated, in town meeting and by its magistrates, all civil matters of merely domestic concern, and for this purpose imposed and collected taxes. It had its own representation in the colonial assembly, and its own militia company. As an ecclesiastical organization, it was a church society, choosing its own minister and other officers, and regulating its own ecclesiastical affairs. In 1643 counties were first organized in Massachusetts. Each county had its own regiment, as each town had its own company. The county cut a small figure in New England.

73. **Influence of the System.**—The influence of local self-government upon New England life was very great. It proved an excellent training school in the science and the art of politics. Samuel Adams, who had more to do with preparing the public mind of Massachusetts for the Revolution than any other one man, has been called the man of the town meeting. Mr. Jefferson expressed great admiration for town government, and strove to introduce it

into Virginia. He said: "These wards, called townships in New England, are the vital principle of their governments, and have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self-government and for its preservation." And again: "These little republics would be the main strength of the great one. We owe to them the vigor given to our Revolution in its commencement in the Eastern States."

II. The County Type.

74. **Early Virginia Life.**—In social factors Virginia differed from Massachusetts. First, the emigrants did not bring with them democratic ideas in relation to religion and civil affairs, but were content with the English church and state systems. They did not come as organized societies, but as individuals. Secondly, social distinctions were far more marked in the emigration; there were paupers and criminals as well as gentlemen and tradespeople. Thirdly, the physical conditions were very different. The rivers, which have been called "fingers of an ocean hand," brought seagoing vessels to the planter's own dock, thus rendering commercial towns at first unnecessary. Lands were granted to individuals, not to communities, and in any quantity that they desired. Men of capital bought large tracts suitable for growing tobacco, just as men of capital in later times bought similar tracts in Dakota suitable for growing wheat. Previous to 1776, when entails were abolished, the oldest son commonly inherited his father's landed estate. There were small farms, but the tendency was to large plantations. Plantation life compelled men to live in the country, while a genial climate and a picturesque nature rendered country life very attractive and enjoyable. In time the absence of towns became a serious inconvenience; there was little trade and less manufacturing; transportation, save on the rivers, was difficult, and the people were mainly dependent upon foreign merchants. Efforts were

now made to stimulate the building of towns, but they were commonly fruitless. Few towns were built, and these were small.

75. **The Virginia Parish.**—This was a reproduction, with some changes, of the English parish. The parish authority was the vestry, composed of twelve men, who were at first elected by the people, but who afterwards filled the vacancies that occurred in their own number. The vestry levied the parish taxes, appointed the church wardens, looked after the poor, and settled the minister of the parish. The sexton and the parish clerk may also be mentioned. There were no schools or town meetings.

76. **The Virginia County.**—This was the political unit of the colony. But since the county could not well meet in county meeting, as the New England town met in town meeting, local government was representative, not democratic. The justices of the peace, usually eight in number, formed the county court. They were appointed by the governor, commonly on the nomination of the court itself, which made the court a close corporation like the vestry. The court appointed its own clerk, who kept the county as well as the court records, and nominated a list of three candidates from whom the governor appointed the sheriff. Besides its judicial functions, the court had charge of the construction of roads, highways, and bridges, appointed the constables, had charge of ferries, admitted attorneys to the practice of the law, licensed innkeepers, and, in early times divided the county into parishes. The other county officers were the coroner, the surveyor, and the lieutenant, who was chief commander of the militia and administrator of the military laws. The county was represented by two burgesses in the House of Burgesses.

77. **Taxation.**—The vestry had a limited power of levying taxes for parish purposes. The county court made the county levy, and the General Assembly the colonial levy. The sheriff was the fiscal officer. "He was not only collector of both public and county levies, and sometimes that

of the parish, but he was the custodian of the tobacco received, paying it out on the proper warrant and rendering account therefor to the county or provincial court. He was, in short, *ex officio* county treasurer—there being no officer bearing that name in Virginia." [1]

78. The Southern States.—Conditions similar to those that prevailed in Virginia in colonial days prevailed also in the other Southern Colonies. This likeness of conditions tended to create likeness of social and political ideas and institutions. Besides, the influence of Virginia on the whole South was considerable. As a result, the county system of government, with minor modifications, was established in all these colonies.

79. Influence of the System.—The county system in colonial times tended to create an aristocratic and centralized local government. And yet Virginia, in 1776, was as well prepared for independence as Massachusetts. Hence we must seek out the popular element in her political life. The vestrymen were usually the most discreet farmers; distributed through the parish, they were acquainted with the details and economy of private life, and they found ample inducements to execute their duties well in their philanthropy, in the approbation of their neighbors, and in the resulting distinction. The parish and county government was open to the public eye. On the political stump, which originated in pre-Revolutionary days, were discussed the rights of the colonies and their relations to England. The centralized administration created able political leaders, just as the town meeting created a well-instructed democracy; while the forces of American life tended to array both alike against the crown and Parliament.

III. The Mixed Type.

80. The Middle Colonies.—The mixed system was due to a variety of causes. First, population was less homo-

[1] Howard, *Local Constitutional History of the U. S.*, Vol. I., p. 399.

geneous in the Middle Colonies than in New England or in Virginia. The character of the country and of the people tended to produce a type of life midway between the town life of the North and the plantation life of the South. Besides, the influence upon these colonies of the older ones was considerable. Hence there appeared here a mixed form of local government. In fact there were two forms of the system, one originating in New York and the other in Pennsylvania.

81. Local Government in New York.—The Dutch created in New York manors, villages, and chartered towns, but nothing corresponding to the county. After the conquest, in 1664, there was progressively developed a dual system that gave more prominence to the county than Massachusetts, and more prominence to the township than Virginia. But the township was first, and retained the local powers not delegated to the county.

82. Local Government in Pennsylvania.—William Penn substantially destroyed the work of the Dutch and the Duke of York when, in 1682, he reorganized the local institutions of Pennsylvania. He set up an exclusive county organization. "The county thus instituted was employed for all the important purposes of self-government. It was a judicial organism, a unit of general civil administration, and a fiscal body." Afterwards, owing to the thickening of population among other causes, the township appeared and began to develop in the colony. It grew up at the expense of the county, as the county grew up at the expense of the township in New York.

83. Framework of the Central Governments.—In every colony the central government consisted of three branches, the Legislative, the Executive, and the Judicial. Save in Pennsylvania, Delaware, and Georgia, the Legislatures were bicameral, not unicameral; that is, they consisted of a lower house, commonly called the Assembly or House of Representatives, and an upper house called the Council. In the colonies mentioned, the Council had no

legislative power, but was merely an advisory executive body.

84. Powers of the Central Governments.—The word colony expresses dependence more or less strict. Hereafter we shall see how the nature and extent of colonial dependence on England became the subject of angry contention; here it will suffice to describe the usual course of government.

The Legislature claimed the right to legislate on all matters of merely local concern, and this the home government usually granted. The charters enjoined the colonies not to infringe upon the laws of England; and about the close of the seventeenth century Parliament enacted that "all laws, by-laws, usages, and customs, which should be enforced in any of the Plantations, repugnant to any law made, or to be made, in this kingdom, relative to said Plantations shall be utterly void and of non-effect." The power to decide what was repugnant, the home government retained in its own hands. All the colonies but Rhode Island and Maryland were required to submit their laws to the crown for its approval; still, they took effect immediately on their passage, and continued in force until formally set aside. Save in Connecticut and Rhode Island, the Governor had a veto on all legislation; he could also adjourn the Legislature, and in some instances dissolve it and call for the election of a new Assembly. The Legislatures voted all colonial taxes. The Courts adjudicated all cases arising under the colonial laws, subject, however, to an appeal to the king in council. Mr. Bryce's statement, "practically each colony was a self-governing commonwealth, left to manage its own affairs, with scarcely any interference from home," is a true description of the times preceding the differences leading to the Revolution.

85. Civil and Religious Rights.—Speaking generally, the colonists who came to America seeking larger civil liberty found what they sought for. They possessed all the civil rights of Englishmen. Trial by jury in both civil and

criminal cases, and the writ of habeas corpus were firmly established. The rights of life, property, and person were the common possession of the people, save as modified by the laws relating to religion. Religious liberty was less fully secured than civil liberty. In New England, save Rhode Island, the Congregational Church was established by law and supported by taxation, as the Episcopal Church was in Virginia and in some of the other colonies. Upon the whole, the colonies were fully abreast of any communities in the world in respect to civil and religious rights, and far in advance of most of them.

86. Political Rights.—In all the colonies, the people participated in carrying on the government, but in different degrees. The people elected the more numerous and powerful branch of the Legislature. In Connecticut and Rhode Island, they also elected the Council and the Governor. In Massachusetts, the Assembly elected the Council subject to the governor's veto. In the proprietary colonies, the proprietors appointed the Governor and the Council. In the royal colonies, the crown appointed both the Council and the Governor. The crown also appointed the Governor in Massachusetts, which was a semi-royal colony. In some colonies, the Judges were for a time elected by the legislature, but at last they were all appointed by the crown, or by the governor acting in the name of the crown.

87. The Elective Franchise.—The right to vote was sometimes regulated by charter, sometimes by law, sometimes by royal instructions to governors, and sometimes by custom. The regulations varied in different colonies, and in the same colony at different times. The county franchise and the town franchise did not always agree. The statutes did not forbid the suffrage to the Negro or the Indian, if he were otherwise qualified, save in the South. There was a tendency to confine voting to British subjects either by birth or naturalization. The New England colonies were disposed to impose moral qualifications, as that a person who had been fined or whipped for any scandalous

offense should not vote until the court should manifest its satisfaction. For a time, most of the same colonies limited the suffrage to church members. As a rule Roman Catholics were excluded from voting. Quakers were sometimes, but not generally, disqualified in terms, but their hesitation to take oaths often had that result. The rule was that an elector must be twenty-one years of age. Custom excluded women, but not the law save in Virginia. There were also residential qualifications, while property qualifications appear to have been universal. The Massachusetts charter of 1691 provided that no person should vote for members to serve in the General Court unless he had a freehold estate in land to the value of forty shillings per annum at the least, or other estate to the value of forty pounds sterling. Many of the colonies required a freehold estate, some of them laying less stress on its value than on its size. Thus, Virginia confined the suffrage to freeholders who had fifty acres of untilled land, or twenty-five acres with a plantation including a house twelve feet square.

In New England *freeman* was originally a technical term, and it continued such in Connecticut and Rhode Island until the nineteenth century. "A freeman did not become such unless he possessed certain prescribed qualifications, and until he had been approved, admitted, and sworn." When that had been done, "his position was analogous to that of a freeman in a city or borough, and as such he became entitled to the exercise of the right of the elective franchise." [1]

This outline of Colonial Government will be all the more intelligible and instructive when compared with a similar one of the government of England.

88. The Saxon Township.—The unit of political organization in England is the township. Its original must be sought in the village community and mark of Germany; the community being a social organization occupying the mark, as its home was called. The original bond was blood relationship. "As they fought side by

[1] See Cortland F. Bishop, *History of Elections in the American Colonies.* Columbia College, 1893. The above paragraphs in relation to suffrage are compiled from this monograph.

side on the field," says Mr. Green, "so they dwelt side by side on the soil. Harling abode by Harling, and Billing by Billing, and each 'wick' and 'ham' and 'stead' and 'ton' took its name from the kinsmen who dwelt in it. In this way, the house or 'ham' of the Billings was Billingham, and the town or township of the Harlings was Harlington."[1] In the course of time, considerable changes were made in this primitive society. As a factor in the feudal system, it became the manor subject to a lord; as a factor in the church system, the parish presided over by a priest. But the township has never ceased to be the primary unit of the English constitution. Mr. Green thus describes the Saxon township government:

"The life, the sovereignty, of the settlement was solely in the body of the freemen whose holdings lay round the moot-hill, or the sacred tree, where the community met from time to time to order its own industry and to make its own laws. Here new settlers were admitted to the freedom of the township, and by-laws framed and head-men and tithing-men chosen for its governance. Here ploughland and meadow-land were shared in due lot among all the villagers, and field and homestead passed from man to man by the delivery of a turf cut from its soil. Here strife of farmer with farmer was settled according to the customs of the township as its eldermen stated them, and four men were chosen to follow headman or ealdorman to hundred-court or war."[2]

89. The Hundred.—In Saxon England, as in ancient Germany, the townships were incorporated into the hundred, the head-man of which was the hundred-man, elder, or reeve. Here appeared the principle of representation, the germ of republican government. Says Mr. Green:

"The four or ten villagers who followed the reeve of each township to the general muster of the hundred, were held to represent the whole body of the township from whence they came. Their voice was its voice, their doing its doing, their pledge its pledge. The hundred moot, a moot which was made by this gathering of the representatives of the townships that lay within its bounds, thus became at once a court of appeal from the moots of each separate village, as well as of arbitration in dispute between township and township."[3]

Although the hundred fell out of place in England, the name appears in the history of several of the American States.

90. The Shire or County.—This was an aggregation of hundreds. The head-man of the shire was at first styled the elderman

---

[1] *The Making of England*, p. 182.

[2] Ibid., pp. 187, 188, ——.

[3] *History of the English People*, Vol. I., p. 14.

or alderman; afterwards the shire-reeve, or the sheriff, appeared as the special representative of the king. The shire-moot was rather a judicial than a political body. Mr. Green thus describes the latter form of the shire-moot:

"The local knighthood, the yeomanry, the husbandmen of the county, were all represented in the crowd that gathered round the sheriff, as, guarded by his liveried followers, he published the king's writs, announced his demands of aids, received the presentment of criminals and the inquest of the local jurors, assessed the taxation of each district, or listened solemnly to appeals for justice, civil and criminal, from all who held themselves oppressed in the lesser courts of the hundred or the soke. . . . In all cases of civil or criminal justice the twelve sworn assessors of the sheriff, as members of a class, though not formerly deputed for that purpose, practically represented the judicial opinion of the county at large. From every hundred came groups of twelve sworn deputies, the jurors through whom the presentments of the district were made to the royal officer, and with whom the assessment of its share in the general taxation was arranged."[1]

91. The Kingdom of England.—The Saxon invaders founded many dominions in Britain; in due time, these dominions were united into one kingdom under the name of England, the completed union dating from the ninth century. This kingdom was composed of the shires or counties, and was governed by the king and his council, which was a representative body consisting of the aldermen, the bishops, whose dioceses at first coincided with the shires, and the royal thegns, or nobles whom the king had created. The council was called the Witenagemot, or Council of the Wise. From this simple government, the present imperial system of Great Britain was progressively developed. The council proper became the law-making authority, the king the law-executing authority. The single assembly became the two legislative houses, the House of Lords and the House of Commons, the one representing the aristocratic and the other the popular elements of the state. A well-known statute in the 25th Edward I. declared that "no tallage or aid" (that is, tax) should be taken or levied without the good will and assent of Parliament, composing the archbishops, bishops, earls, barons, *knights, burgesses, and other freemen of the land.* In time the power to vote all supplies was expressly limited to the Commons. The power to decide certain cases at law that the king and council at first possessed, passed to a cycle of courts, except that the House of Lords continued to retain a certain appellate jurisdiction. When this evolution was completed, the three functions of

[1] *History of the English People*, I., 353.

government had been committed to three separate branches or departments: the legislative to Parliament, the executive to the Crown, and the judicial to the Courts of Law. The crown finally lost its veto on legislation; but about the time when the veto became obsolete, a practical working connection between the legislature and the executive was effected by means of the device called the Ministry, and sometimes the Administration and the Government. It is to be said, however, that all these lines had not been clearly drawn when the English colonies were established.

92. **The English System Free.**—It will be seen that the Saxons established in England a free system of government. It was carried on partly by the freemen themselves, and partly by their representatives. The king was not regarded as ruling by divine right, but as the delegate of the nation. It combined therefore both democratic and republican elements. Time wrought its changes; the monarchical, aristocratic, and democratic elements varied in strength at different times; but the great features of the Saxon constitution were never lost, and the government progressively became the freest in the world.

93. **Likeness of the Colonies to England.**—The above recital of facts shows how like the thirteen colonies were to the parent state. With variations of detail, they all reproduced the political institutions of England; and, save that they were not sovereign states, they were Englands in miniature. Their town, county, and mixed systems of local government were an outgrowth, under new conditions, of the local institutions of England. Their legislative, executive, and judicial departments were copies of the Parliament, king, and courts of England. The houses of representatives and the councils were the House of Commons and the House of Lords over again. In fact, in some of the colonies the lower house was called the House of Commons. The people in England voted for members of the House of Commons only; and in the colonies, with the exception of the two republican colonies of Connecticut and Rhode Island, they voted only for members of the popular branch of the legislature. An appointed Council had taken the place of the hereditary House of Lords, and an appointed Governor the place of the hereditary King. More men relatively exercised the right of suffrage in the colonies than in England, but their suffrage did not directly affect, with the exceptions named, more departments of the government. Hence, the common statement that the colonists came to America with new political ideas cannot be true of governmental forms and processes. In this respect they brought nothing new and established nothing new. They wished to give the people more weight in conducting the government according to the old forms, and this they accomplished.

Besides, they were more interested in enlarging their civil and religious rights than their political rights.

94. New Modes of Government Rejected.—At first some new modes of government, or at least modes unknown to the English people, were attempted. In Virginia the first local government was a despotism centered in the Council, limited only by the company and the king in England. Plymouth and Massachusetts both tried democracy for a few years. Moreover government by commercial companies such as the charters of 1606 and 1620 contemplate, or by a benevolent association, as in Georgia, was foreign to the English mind and habit. The thoroughness with which these devices were swept away, and the uniformity and promptness with which forms and modes of government familiar to the people were established, show the strength of political habit. Perhaps, too, proprietary government would have gone with the others, but for the fact that it was simple and easily understood, the proprietary being merely a lieutenant-king.

95. The Dual System.—Circumstances, however, made one important departure from English precedent necessary. This was dual government, the double jurisdiction of the crown and the colony. If the planters had not insisted upon being admitted to participation in public affairs, they would not have been Englishmen. If the king had not insisted upon extending his authority over the Plantations, he would have had no colonies. Mr. Bryce says the American of to-day has "two loyalties and two patriotisms." His colonial ancestors had them also. At Jamestown and Boston are found the roots of our federal system.

96. The Governments Growths.—These well-defined governments, although they conformed so closely to the English model, were not set up at given places or times. Like all really useful political institutions, they were progressively developed. Not one of the charters fully describes the government existing in the colony organized under it. The Declaration of Independence charged the king with conspiring with others to subject the colonies to a jurisdiction foreign to their constitution. This language relates to the colonies collectively, as one. But the colonies as one had no constitution in the sense that the United States have one to-day. They did, however, have a constitution in a wider and less definite sense. The forms of government transplanted from England; the rights and usages belonging to all Englishmen and expressly guaranteed to the colonies,—these, modified by American conditions, made up the constitution that the king sought to overthrow.

97. English Colonies Compared with New Spain and New France.—Nothing could more clearly show the remarkable political genius of the English colonists than such a comparison carefully

wrought out. The Spanish and French colonies were established by patronage or power, and they were ruled in the spirit of absolutism by royal governors. They did not desire self-government; in fact, did not know what it is; and the more paternal the government became the more content they were. When Count Frontenac took steps in the direction of establishing municipal institutions at Quebec, Colbert, the great French minister, reproached him, saying: "It is well for you to observe that you are always to follow, in the government of Canada, the forms in use here; and since our kings have long regarded it as good for their service not to convoke the States-General of the kingdom, in order, perhaps, to abolish insensibly this ancient usage, you on your part, should very rarely, or, to speak more correctly, never give a corporate form to the inhabitants of Canada. You should even, as the colony strengthens, suppress gradually the office of the syndic, who presents petitions in the name of the inhabitants; for it is well that each should speak for himself, and no one for all."[1] Political life is impossible under such a regime as this. The Thirteen Colonies came up in a very different way; and, save in times of war, they were never so happy as when crown and Parliament left them most severely alone.

---

[1] Parkman, *Count Frontenac*, page 20.

NOTE.—Within a few years a disposition has been shown, and notably by Mr. Douglas Campbell (see *The Puritan in Holland, England, and America*) to emphasize Dutch influence in the development of American institutions, largely to the exclusion of English influence. To repel the extreme claim that has been made, it is not necessary to deny Dutch influence altogether. A recent writer sums up the contention as follows:

"(1) It is claimed that America was influenced by Holland, because Holland exerted an influence over England. But it is evident that this particular line of influence, whatever it may have been, reached America through England. Little is said by these one-sided writers of any influence exerted by England over Holland. (2) It is claimed that because the Pilgrims and some of the early Puritans passed through Holland on their way to America, they were controllingly influenced by the Dutch. But there is practically an ignoring of the fact that these men had spent the greater part of their lives in England, and were by birth and blood Englishmen. (3) It is claimed that by means of commercial transactions, Holland and New Amsterdam influenced the social life of the colonists. But the long and bitter hostility of the colonists toward the Dutch is unmentioned. And the fact is left out of sight, that the main contact and commerce of the colonies, down to the very last, was with England." Stevens, *Sources of the Constitution*, page 19.

CHAPTER III.

AMERICA INDEPENDENT.

REFERENCES.

I. HISTORIES OF THE UNITED STATES.—Bancroft, Vols. II.-V. ("The American Revolution, in Five Epochs"); Hildreth, Vols. II., III.; Winsor, Vol. VI., particularly Chap. I., "The Revolution Impending"; Pitkin, Chaps. VI.-IX.; Johnston, *The U. S.*, III., IV.; Hart, Chap. III.

II. SPECIAL WORKS, ARTICLES, ETC.—Greene, *Historical View of the American Revolution*, I.; Goodloe, *The Birth of the Republic* (a compilation of documents); Johnston, "Congress, Continental," and "Declaration of Independence," in Lalor; Story, Book II., Chap. I.; Frothingham, Chaps. V.-XI.; Woodburn, *Causes of the American Revolution* (*J. H. U. Studies, Tenth Series*, XII.); Curtis, *History of the Constitution*, Book I., Chaps. II., III.; Wilson, *The State*, XI.; Burke, *Speech on Taxation of America*, and *Speech on Conciliation of America.*

III. ENGLISH WRITERS.—Goldwin Smith, *The United States*, Chaps. I., II.; Seeley, *The Expansion of England*, Course I., Lecture 8; Lecky, *History of England in the Eighteenth Century*, Chaps. XII., XVIII.; Green, *History of the English People*, Book IV., Chap. II.

98. Growth of the Colonies.—At first the growth of the colonies was slow, afterwards rapid. This growth included all the material and moral elements of power—territory, population, wealth, intelligence, and religion. In the war that transferred the French dominions on the continent east of the Mississippi to England, the colonies were a prominent factor. Colony, which first meant a single feeble settlement on the seashore, now meant a vigorous and thriving commonwealth. The Virginia of 1775, for example, was no longer Jamestown, but a noble province that extended to the Ohio River, embracing many hundreds of plantations and containing half a million of people.

99. Population.—In colonial days there were no regular or complete censuses; and historians, dealing with population and wealth, are compelled to rely on very imperfect data. Mr. Bancroft supposes that the population of the country in 1774 was 2,600,000.[1] This is about one-fourth of the population of England and Wales at that time. Nearly all of this population was American-born. To no colony had the emigration from Europe been of long continuance, or great in numbers. The younger colonies, to a considerable extent, drew their population from the older ones.

100. Wealth and Commerce.—Unfortunately, there are no statistics showing the growth of wealth, or its total amount at any one time. Great progress was made, however, in agriculture, in lumbering, and in fisheries, considerable progress in manufactures, and some in mining. Durand wrote of the colonies in 1766: "They are too rich to remain in obedience."

101. Independence Declared.—All this time the conspicuous fact in the politics of these commonwealths was their dependence upon England. But, suddenly, as the casual European observer must have thought, there came a great change. Early in the year 1775, the colonies united to resist by force of arms the efforts of the mother country to govern them; and on July 4, 1776, the Continental Congress, representing them all, published and declared:

"That these United Colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that as free and independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do."

---

[1] *History*, Vol. IV., p. 62.

The British colonies in North America now became the United States of North America. The War of Independence made the declaration good. As the planting of these colonies was the most far-reaching event of the seventeenth century, so their independence was the most far-reaching event of the eighteenth.

102. **Cause and Occasion of the War.**—The Declaration of Independence assigns the causes that impelled the colonies to separation. These causes form a "history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States." The facts recited were rather the occasion than the cause of separation. The American Revolution was a step in that grand march of civilized man toward larger freedom and better political institutions, which began in Europe in the fifteenth century, and has continued until the present day. This movement was felt in England before the American Plantations were made, and was particularly vigorous in the seventeenth century. In America, it went forward with more momentum than in England. The American Revolution was a kind of continuation of the English revolutions of 1642 and 1688; and its best definition is, a clash between the republican ideas of America and the monarchical and aristocratical ideas of England. The Declaration of Independence and the Constitution of the United States belong to the same series of great charters of human rights as Magna Charta, the Petition of Right, the Bill of Rights, and the Reform Bill. At the utmost, the facts recited in the Declaration were only proximate, and not original, causes of the division of the British Empire.

103. **Idea of Nationality.**—The colonies occupied the edge of a vast territorial empire that was the fit home of a great sovereign people. A people had been slowly forming in this empire worthy to possess it. They were 2,600,000 in number. They abounded in that capacity for self-government which is so characteristic of the English race.

They represented the advanced civil, political, and religious ideas of the world. At the beginning, they sought only a redress of grievances; for a full year, they shrank from cutting the ties that bound them to the mother country; and yet, unconsciously to themselves, the idea of nationality had slowly been taking form in their minds. The name "Continental" given to the Congress, the army, and the cause shows how readily they caught the vision of independent empire. Turgot wisely said that "Colonies are like fruits, which cling to the tree only till they ripen."

An historical review will illustrate the foregoing statements.

104. England in 1603.—In 1603 England was a great and progressive state. In no country did the people, on the whole, enjoy more civil, political, and religious rights. In a long series of struggles with arbitrary power, the people had won a large measure of freedom. In these respects, the Englishman of Queen Elizabeth's time was far in advance of his contemporaries on the Continent, save alone the Hollander.

105. The English Revolution of 1642.—Soon after the House of Stuart came to the throne, there came a crisis in English history. Broadly stated, the issue when defined was, How much power shall belong to the king, and how much to Parliament? Narrowly stated, Shall the king levy taxes that have not been voted by the House of Commons? When Charles I. could not obtain a parliament that would conform to his wishes, he undertook to govern without one; and this attempt brought on, in 1642, a civil war, that finally ended, in 1649, in his death, the overthrow of the monarchy, and the establishment of the Commonwealth. Religious rights were also involved in the struggle. And it is important to note that the first British colonies in America were planted while this long contest was going on.

106. Political Character of the Colonists.—The colonists brought with them to America all the free political institutions that had slowly grown up in England. The royal charters guaranteed to them the common rights and liberties of Englishmen. Moreover, a large number of them held the most advanced civil, political, and religious views then held in England. Not a few of them—all in fact, who founded New England, and some in other colonies—left the mother country on account of these views. Thus, to an extent the men who planted the colonies were even more pronounced in their political and religious sentiments than the men who successfully resisted tyranny in England. Some of them were the same men.

107. The Growth of Free Sentiments.—The English institutions and ideas brought to America were virile, and all the conditions were favorable to their growth. Population was sparse; the restraints of old and thickly peopled societies were in a measure removed; the Plantations were separated from the Old World by the Atlantic Ocean. Men living in the forests of America were not likely to pay great deference to a distant government that had left them to depend upon themselves. Everything tended to engender the spirit of freedom, and the spirit of freedom finally ripened into the spirit of independence. It is not strange, therefore, that at the end of a century and a half, the people of the colonies came to hold advanced opinions concerning human rights and the nature and powers of government. Still, the bonds of society were not relaxed; on the other hand, the people were generally as devoted to law, order, and civil obedience as any in the world.

What the advanced political views of the colonists were, when the struggle with England culminated, can best be learned from the Declaration of Independence. They were pure republicanism. Similar views were then found in books written by political philosophers, but no government rested upon them as a foundation.

108. The English Revolution of 1688.—In the war of 1642-1649, the popular party in England won the day. But by 1660 that party had lost its hold on the country, and the Stuarts came back to the throne. Charles II. ruled in a very arbitrary manner, and his brother, James II., who succeeded him in 1685, in a manner still more arbitrary. The result was a second revolution that, in 1688, drove King James from the country, made William of Orange king, and once more started England on a course of political progress. The rights for which the popular party had contended were now effectually secured. The independence and supremacy of Parliament were established, and the Bill of Rights enacted. Never again did any English king attempt what some of the old kings had done. So far, the general courses of events in England and America were parallel. Indeed, the two series of events made up the one movement that the English-speaking race was making toward larger rights and greater freedom. Neither series can be understood without the other. Still it must be said that some of the colonies, notably Virginia, sympathized with the Stuarts.

109. Later Course of Events in England.—Still, the mother country did not, and could not, keep pace with the colonies in the progress of political ideas. The ascendency of the House of Commons, as representing the nation, was secured, but the House of Lords and the king were still powerful. The old Royalist party was crushed, and finally disappeared altogether; but there soon appeared

a new conservative party called the Tories, embracing a majority of the nobility and nearly all the clergy of the Established Church, which was devoted to maintaining in full vigor the hereditary parts of the government. The Whigs or liberal party were practically content with what had been gained, and were adverse to further changes. For the time, political progress in England was mainly arrested; now one party and then another governed the country, and there were no political issues intimately affecting the rights of men. In 1760 George III. came to the throne. He was a man of narrow mind, of intense convictions, a thorough Tory filled with the royal prerogative, and resolved on playing the part of a king. He would rule as well as reign. He failed in the end to carry out his ideas; but he arrested for a time political progress in England, and brought on the American war.

110. **The Way Prepared for Separation.**—From an early time it had been found difficult to adjust the practical relations of the colonies to the mother country; and the more the colonies increased in strength, the more difficult the problem became. It is, therefore, obvious that, if England and the colonies continued to move on the lines now marked out, only a fitting occasion would be necessary to bring them into collision. It would be skillful management, or great good fortune, that could ultimately prevent the republican ideas of America from clashing with the monarchical ideas of England. The collision came in 1775. It did not spring from accidental or momentary causes. Had the British government pursued a conciliatory course, the day of collision and separation would have been deferred, how long no one can tell; but the king was too self-willed, his ministers too subservient, Parliament too narrow in its views and too determined, to pursue such a course. The people of every colony were subject to two jurisdictions, one local and one general, that must be adjusted to each other. To effect such adjustment caused no little friction; and the colonies and the mother country got on peaceably as long as they did, only because neither one pushed its theory of colonial relations to an extreme, each yielding something to the other and thus effecting a compromise. England was very proud of her American colonies; but, as though blind to all the forces that tended to separation, she pursued a policy that led by swift steps to their loss.

111. **American Theory of Colonial Dependence.**—The colonists had decided views of their proper relations to the home government, as well as of the proper nature and powers of government in general. They held that the dominion which the Cabots had discovered in America belonged to the king rather than to the kingdom of England. Englishmen adventuring into this dominion to

plant colonies, were entitled to all the privileges of free-born Englishmen at home; trial by jury, habeas corpus, and exemption from taxes that their own representatives had not voted. The British Empire was not one dominion, but several dominions. Every one of these dominions had, or should have, its own legislature to enact laws for its government; no legislature had jurisdiction over all. Dr. Franklin said: "Our kings have ever had dominions not subject to the English Parliament." He pointed to Scotland, to Ireland, and Hanover. Before its union with England, Scotland was a dominion of the king, but had its own parliament that enacted all local laws; while at the time the Doctor wrote, Ireland and Hanover still had their independent legislatures. Franklin said further: "America is not part of the dominions of England, but of the king's dominions. England is a dominion itself, and has no dominions." "Their only bond of union is the king." "The British legislature are undoubtedly the only proper judges of what concerns the welfare of that state; the Irish legislature are the proper judges of what concerns the Irish state; and the American legislatures of what concerns the American states respectively." The word colony was objected to as not expressing the true relations of America and England, since it implied the dependence of the one upon the other. The colonies were not one dominion but thirteen dominions; and in every one the colonial legislature was as supreme as Parliament was in England. Parliament, therefore, had nothing more to do with Massachusetts or Virginia than the legislatures of those colonies had to do with England, or than Parliament itself had to do with Ireland or Hanover. The king, who alone had a voice in the matter, had, in their charters, guaranteed to the colonies the Common Law so far as this was applicable to their condition, and he was now powerless to withdraw what he had then conceded. Thus repudiating all power of Parliament over them, the colonies held the king responsible for everything done in England relating to American affairs. Many of the things complained of in the Declaration of Independence were acts of Parliament; but the Continental Congress, not once mentioning Parliament, charged them all upon the king.

Such, in outline, was the American theory of colonial relations. Still no one pretended that this theory had ever been fully carried out in practice.

112. **The British Theory.**—The common British theory was, that Englishmen did not cease to be Englishmen when they emigrated to the American dominions of the king; that the power of Parliament, to which they were subject in the old home, followed them to the new one; that the American colonies were subject in all things

to Parliament; and that Parliament could yield them more or fewer powers of self-government for a time, and then withdraw them. It was also claimed that the colonies were already represented in the House of Commons, since the members of that body did not represent particular districts or constituencies, but the whole empire. The right of suffrage was a very different thing from the right of representation. Even in England, it was said, but a small number of persons voted. Besides, the colonies themselves had repeatedly acknowledged the authority of Parliament by submitting to its legislation. Still no one pretended that this theory had ever been fully carried out. It was an outgrowth of the current European ideas of the nature and object of colonies.

113. **The Colonial System.**—In the days of American colonization, the maritime powers of Europe did not see in the New World fields for the planting and expansion of European civilization, but fields for the extension of their own power. They did not plant colonies in the hope that these would become flourishing independent states, but in the hope that they would add to the wealth and power of the mother countries. Colonies would produce commodities that the mother countries wanted to buy, and consume commodities that those countries wanted to sell. It was a matter of markets, of the carrying trade, and maritime and naval power. Mr. Grenville thus summed up the colonial system: "Colonies are only settlements made in distant parts of the world for the improvement of trade, and they would be intolerable except on the conditions named in the Acts of Navigation." Lord Sheffield said, "The only use of American colonies is the monopoly of their consumption and the carriage of their produce."

114. **The Navigation Acts.**—The first of the Navigation Acts, without which, according to Mr. Grenville, colonies would be intolerable, was almost as old as the colonies themselves. Their sole object was the upbuilding of British commerce, and how disadvantageous to the colonies they might prove to be, was never so much as asked. In 1651 it was enacted that all the colonies should export only to England such products as they had to sell, and should send them in English-built ships. In 1660 the import trade was similarly limited. In 1672 taxes were imposed on the trade between the different colonies. In 1694 the exportation of wool, yarn, or woolen manufactures to any place whatever was prohibited. In 1719 the House of Commons condemned all American manufactures as tending to independence. In 1732 the exportation of hats was forbidden; and in 1750, rolling mills, iron furnaces, and forges were declared nuisances to be suppressed by the colonial governors. The finest pine trees in the forests were marked with the "broad arrow," de-

noting that they had been selected as masts for the king's ships, and that they must not be cut by the lumberman. Even Lord Chatham said that in a probable contingency he would not allow the colonies to make a hobnail. As early as 1671, Sir William Berkeley, governor of Virginia, complained that the navigation laws were a "mighty and disastrous" obstruction to the prosperity of that colony. "We cannot," he said, "add to our plantations any commodity that grows out of it, as olive trees, or cotton, or vines. Besides this, we cannot produce any skillful men for our hopeful commodity of silk, and it is not lawful for us to carry pipe-stems or a basket of corn to any place in Europe out of the king's dominions." Later, the execution of these laws was much relaxed, and the colonial trade was not much interrupted; but in 1760 the home government set about their vigorous execution. This attempt the colonies resented. Says Mr. Bancroft: "American independence, like the great rivers of the country, had many sources; but the head spring which colored all the stream was the Navigation Act."

115. **Moral Interests of the Colonists Disregarded.**—Facts showing the habitual disregard of the moral interests of the colonies are numerous. Sir Robert Walpole, the British minister, told Bishop Berkeley, who proposed to found a university in America, that while the labor and luxury of the Plantations might be of great advantage to the mother country, their advancement in literature, the arts, and sciences could never be of any service to her. A Virginia commissioner who asked of the royal attorney an increased allowance for the churches of that colony, pleaded: "Consider, sir, that the people of Virginia have souls to save." He was answered: "Damn your souls! make tobacco." Such indifference to colonial sentiment made a deep impression in America.

116. **The Compromise Theory.**—The conflict between America and England began, as the conflict between King Charles and Parliament began, about taxation. Down to 1760, the home government had imposed customs duties on the foreign and intercolonial commerce of America and the people had paid them. More than this, the home government did not attempt. The Congress of 1774 said that, since, from their local and other circumstances, they could not be represented in Parliament, they were entitled to a free and exclusive power of legislation in their provincial legislatures, where their right of representation could alone be preserved, in all cases of taxation and internal polity, subject only to the negation of the sovereign. They also said, from the necessity of the case, and a regard to the internal interest of both countries, they cheerfully consented to the operation of such acts of the British Parliament as were, *bona fide*, restrained to the regulation of their external commerce, for the pur-

pose of securing the commercial advantages of the whole empire to the mother country and the commercial benefits of its respective members. The colonies not only paid the expenses of their own governments, but contributed, as called on, to the royal treasury. Meantime, the home government carefully abstained from levying in the colonies internal taxes. Whenever the king desired their financial assistance, he called on the several colonial legislatures to vote supplies, just as he called on the English or the Irish Parliament, and just as he had called on the Scottish Parliament before the Union; and these supplies the colonial legislatures voted with such liberality that, more than once, Parliament refunded to them portions of their contributions. It was said in England—and this was a part of the English theory—that the power to levy external taxes involved the power to levy internal taxes. This the colonies denied. The English race is not given to fighting over theories; and so long as the home government did not attempt to levy internal taxes, the two parties managed to get on together, although their relations were often strained. The first attempt to levy such taxes, in connection with the new attempt to enforce the Navigation Acts, fired the train that a century had been laying.

117. **The Close of the French and Indian War.**—The long struggle between England and France in North America came to an end in 1763. England was burdened with debt, and compelled to look in every quarter for increased financial resources. George III. was intent on carrying out his notions of prerogative. Tory influence was in full ascendency. The Thirteen Colonies had now reached an aggregate population of about 2,000,000; together, they had at one time kept 20,000 armed men in the field in the late war; they had gained a severe discipline in that struggle, and they had learned their own strength and resources; the conquest of Canada removed their fears of attack from that quarter, such as had constantly haunted them since 1688, and they were fully prepared to resist all aggressions on their cherished rights.[1]

118. **British Theory Put into Execution.**—The home government thought the time a favorable one to abandon the compromise theory, and to give effect to the British theory. In 1760 it sent orders to the American customhouses to enforce the Navigation Acts. The customs officers, armed with writs of assistance, were to search stores and houses for goods that had not paid duty, or the importation of which was prohibited. British vessels of war on the coast

[1] Kalm, a Swedish traveler who visited America in 1754, detected the feeling of the colonists in their conversation, and wrote that nothing but fear of the French on the northern border could keep them in subjection to England.

were to lend them aid. The government also began to levy internal taxes. After 1762 this was the royal programme, sometimes changed in details but never abandoned: The colonies to contribute regularly to the royal treasury; the colonial legislatures not to be asked to vote supplies, but Parliament to vote them directly; the salaries of the colonial governors and judges to be paid by England, thus teaching them to look to her rather than to the people whom they governed for their compensation; and a British army to be maintained in America at colonial expense.

119. **No Taxation without Representation.**—To every one of these items but the first the colonies were inflexibly opposed. Especially was every form of internal taxation by the home government vigorously resisted, as the history of the stamp tax, the window tax, and the tea tax shows. This resistance was not made because the taxes were unnecessary, or because the amounts levied were excessive, but because Parliament had no right to impose them. Besides paying the cost of their own governments, including the salaries of all officers, the colonies were still willing to contribute, when called upon, to the royal treasury; but their legislatures alone had the right to vote the supplies, because in them alone were they represented. The principle involved was expressed in the battle cry: "No Taxation without Representation."

120. **Mr. Burke on the Causes of American Discontent.**—The great statesman Burke saw clearly the movements of events in America. In explaining these movements to the House of Commons, in 1775, he traced the progress of events. He declared that from six sources—descent, form of government, religion in the North and manners in the South, education, and the remoteness of the colonies—a fierce spirit of liberty had grown up. It had grown with the growth of the people and increased with the increase of their wealth; a spirit that, unhappily, meeting with an exercise of power in England which was not reconcilable to the colonists' ideas of liberty, had kindled a flame that was ready to consume the mother country. He connected the resistance of the Americans to British taxation with the old English struggles for freedom. He said those struggles, from the earliest times, were chiefly upon the question of taxing. It had been held, from the very nature of the House of Commons, as the immediate representative of the people, that the power to tax resided in that body. It was a fundamental principle that, in all monarchies, the people must directly or indirectly grant their own money, or no shadow of liberty could exist. Said the orator: "The colonies draw from you, as with their life-blood, these ideas and principles. Their love of liberty, as with you, fixed and attached on this specific point of taxing. Liberty might be safe, or might be endangered, in twenty other particulars, without

their being much pleased or alarmed. Here they felt its pulse; and as they found that beat, they thought themselves sick or sound."

121. **English and American Liberty.**—The connection of the two countries was closer than has yet appeared. While nearly all Englishmen held that Parliament was supreme over the colonies, and so had the power of taxation, many, as the more liberal and progressive Whigs, doubted or denied the wisdom of its exercise. These men conducted a steady but ineffectual resistance to the American policy of the king and ministry. They sometimes called Washington's army "our army," and spoke of the American cause as "the cause of liberty." The names of the two English political parties also became the names of the two divisions into which the American people were divided, Whigs and Tories. While the war was going on, the king was also seeking to carry out his ideas of prerogative in England. The men who opposed his American policy also opposed his home policy. For a time, these men were in a feeble minority, and the king had his way; but the day of their triumph and of the king's defeat came with the success of the American arms. Not only was America free, but the failure of arbitrary government in America involved its failure in England. At the close of the war, forces began to act that, after still further delays, reformed the House of Commons and enlarged its powers, and limited still more the power of the king and the House of Lords. Thus English liberty, long arrested in its course, once more moved onward. Says Mr. Fiske: "The system which George III. had sought to fasten upon America, in order that he might fasten it upon England, was shaken off by the good people of both countries at almost the same moment of time."

CHAPTER IV.

THE FORMATION OF THE UNION.

References.

I. Histories of the United States.—Bancroft, Vol. IV. ("The American Revolution," Epoch 3); Hildreth, Vol. III.; Winsor, Vol. VI., Chap. III.; Pitkin, Chaps. VIII.-X.; Johnston, *The U. S.*, III., IV.; Hart, Chaps. III., IV.

II. Special Works, Articles, Etc.—Goodloe, Johnston, Story, and Wilson, last references; Curtis, Book I., Chaps. II.-VI.; Frothingham, Chaps. IX., XI.; Bryce, Part I., Chaps. I., II.; Small, *Beginnings of American Nationality* (*J. H. U. Studies, Eighth Series*, I., II.).

122. **Relations of the Colonies.**—At first the colonies were wholly separate and distinct settlements, or groups of settlements, on the edge of a vast continent, often widely separated. But some bonds of union existed from the beginning. The colonists were mainly of English blood; they had the same national history, the same political and civil institutions, the same general customs, the same language and literature. They had a common citizenship, since the inhabitants of any one colony enjoyed all the rights and privileges of the inhabitants of any other. They had common enemies and friends, common dangers, objects, and hopes. There was more or less emigration from one colony to another, which time and social and business connections multiplied. The name they bore marked them off from all the world as one society or people. The Declaration of Independence spoke of their constitution. So, while their only governmental bond was their common dependence upon England, they still formed a moral and social unity that continued to strengthen until events created a political unity.

123. The United States.—The Declaration of Independence must be considered under two aspects.

1. It changed the colonies into States by severing the bonds that bound them to England. On the one side of July 4, 1776, they are British colonies; on the other, free and independent American States.

2. It created the political unity, or the state, since known as the United States of America. While severing their connections with the other parts of the British Empire, this act materially strengthened those connections that constituted the colonies one people. American independence was a concerted movement. The States used the Continental Congress to effect this purpose, not their local assemblies or congresses. There was one Declaration of Independence, not thirteen declarations. They did not act singly, but together. They did not become the nations of Massachusetts, Virginia, etc., but the United States of America. In this capacity they adopted the army at Boston, appointed Washington commander-in-chief, waged war, renounced their allegiance to England, and took their separate station among the nations of the earth.

Thus, the States as free commonwealths and the Union originated in the same act. Independence did not destroy dual government. Each State continued a society in itself, and also a part of a larger society. The American Union had come in the room of the king and Parliament. But the States were necessarily reorganized and adjusted to the new order of things.

124. The Colonies Reorganized as States.—Independence destroyed the old legal foundation of the States, and made it necessary to provide a new one. A people so tenacious of political habits as the Americans of that day, and so committed to government by law, could not rest until they had adjusted their State governments to the new state of affairs. In fact, they did not wait for the formal declaration of independence before acting. As early as May, 1775, colonies began to apply to Congress for advice

to guide them in the emergency that had arisen. Besides earlier and partial replies, Congress adopted, May 10, 1776, the following resolution, with an appropriate preamble:

"Resolved, that it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general."

All the colonies but two acted in conformity with this recommendation. Their action took the form of State constitutions, adopted and put in force in the years 1776-1780.

125. **The First Constitutions.**—These constitutions were the first instruments of the kind ever made. Some of them, framed in haste, were very brief and imperfect, and were soon laid aside; others were well matured, and that of Massachusetts, variously amended, is still in force. The first constitutions were drawn up by State conventions or congresses, some of which were composed of members of the Assemblies, and some especially constituted for that purpose. The General Court of Connecticut formally declared, in 1776, that the charter granted by King Charles II. in 1662 should be and remain the civil constitution of the State. Rhode Island also continued her charter, but without any formal declaration to that effect. Connecticut adopted her first constitution in 1818, and Rhode Island hers in 1842.

126. **Source of the New Constitutions.**—The source of the new constitutions was the popular will. From that day to this, supreme political power in the United States, both as a theory and as a fact, has resided in the people. Only the constitution of Massachusetts, of those first formed, was submitted to the popular vote for ratification; but the assemblies, conventions, and congresses that ordained the others did so as the representatives of the people. The

Virginia preamble ran: "We, the delegates and representatives of the good people of Virginia, do," etc. That of Massachusetts: "We, the people of Massachusetts," etc.

127. **Models of the New Constitutions.**—But where did the States find their models? The State constitutions, as documents, were no doubt immediately suggested by the colonial charters. In important respects they differed from the charters: the charters emanated from the king, the constitutions from the people; the charters were grants of rights and powers to the people, the constitutions were acts of the people organizing government. Both the constitutions and the charters had a certain likeness to the old English charters, as Magna Charta and the Bill of Rights; also the constitutions made or proposed for England in the time of the Commonwealth may have been in the minds of the statesmen of 1776-1787. Mention may be made of the Instrument of Government that created the Protectorate in 1653.[1]

128. **The Transition from Colony to State.**—The Colonial governments were not destroyed, but were rested on a new foundation, adjusted to a new political system, and in all essential features continued under a new name. The division into three branches, the bicameral legislature, the common parliamentary law, the former local institutions, and all the old safeguards of civil liberty were duly perpetuated. As one has said: "The revolu-

[1] Commenting on the similarity of the frame of government in the republics that make up the United States,—"a similarity which appears the more remarkable when we remember that each of the republics is independent and self-determined as respects its frame of government,"—Mr. Bryce observes that it "is due to the common source whence the governments flow. They are all copies, some immediate, some mediate, of ancient English institutions, viz., chartered self-governing corporations, which, under the influence of English habits, and with the precedent of the English parliamentary system before their eyes, developed into governments resembling that of England in the eighteenth century. Each of the thirteen colonies had up to 1776 been regulated by a charter from the British crown, which, according to the best and oldest of all English traditions, allowed it the practical management of its own affairs. The charter contained a sort of skeleton constitution, which usage had clothed with nerves, muscles, and sinews, till it became a complete and symmetrical working system of free government."— *The American Commonwealth*, Vol. I., p. 458. (1888.)

tion was not a war against these things; it was a war for these things—the common property of the Anglican race." The States, so far from being merged into one consolidated government, became more vigorous than ever. They retained their old powers, and acquired still others that had been exercised or claimed by the home government. They had exclusive control of taxation, commerce, and navigation. Save the important powers delegated to the Union, all governmental powers belonged to them. Moreover, these reorganized governments were constituted, and more or less fully described, in written constitutions that rested directly upon the popular authority. Thus, the colonial governments were not only continued but strengthened.

Many of the new constitutions referred to the recommendation of the National Congress; some of them distinctly recognized that body. Massachusetts, for example, in the oaths prescribed to be taken by officers under the State, excepted "the authority and power which is or may be vested by their constituents in the Congress of the United States" from the authorities and powers that such officers were required to forswear.

129. **The Union.**—The new strength and dignity that were given to the States were far from being the most prominent result of independence. This result was rather the Union, or the American state, which now took its separate place among the powers of the earth. An intelligent foreigner, visiting the country both before and after the war began, and noting the changes that took place, would have remarked the Continental Congress above all other things. But, notwithstanding its prominence, the Union was less fully organized than the States. A written constitution was not for some time adopted; and the unwritten one that was tacitly agreed to, and that soon became customary, left the General Government weak and inefficient. Both results were perfectly natural. In the case of the States, all that was necessary was formal reorganization; while in the case of the Union, a new government had to be created.

What the ultimate nature of the Union would be, had been by no means decided; but a union had been effected, a General Government had been established, and a provisional distribution of powers between this government and the States had been made. There were still two loyalties and two patriotisms as before, and both were American.

130. **The American State.**—Before its birth the largest features of the American state were determined. These features were now partly formulated in written State constitutions, and partly based on common consent or an unwritten national constitution. The State side of the system was much better developed than the National side. Since that day many important changes have been made in the constitution of the American state; and yet the States comprising the Union have never changed their essential nature; they have never possessed national sovereignty, and have never been states in the sense that England and France are states, or that the Union is a state.

The steps leading to the formation of the American Union must now be traced out more carefully.

131. **The Consolidation of Colonies.**—The original Connecticut was formed by the union, in 1639, of the towns of Hartford, Wethersfield, and Windsor. The colony of New Haven originated about the same time in the union of the towns on the Sound, the principal of which was New Haven. Furthermore, in 1662, the two colonies were merged in the one colony of Connecticut. Rhode Island had its origin in the union of the various plantations on Narragansett Bay. Plymouth was merged in Massachusetts Bay in 1691. Thus, the colonists had frequent examples of partial unions in their own history. Nor were examples of general unions of a certain sort lacking.

132. **The United Colonies of New England.**—In 1643 the three principal New England colonies entered into a league that is sometimes known by the above name, and sometimes by the name of the New England Confederation. This league was called into being by common dangers to which the three colonies were exposed from the Indians and the Dutch; it dealt with such subjects as war, peace, Indian affairs, and intercolonial roads. For a time it played an important part in New England history; then became weak, and in 1684 ceased to exist.

133. **Penn's Plan of Union.**—In 1697 William Penn presented to

the English Board of Trade a scheme for rendering the colonies more useful to the crown and to one another. It provided for a congress to be composed of two deputies from each colony, and to be presided over by a royal commissioner, who should also command the troops enrolled to meet a common enemy. Nothing came of this plan of union, but it was the first one proposed for all the colonies, and the first document relating to American affairs containing the word congress. It also contained the doctrine of taxation for which the colonies contended in the next century.

134. **Wars with the French and Indians.**—The common dangers arising from these wars greatly stimulated union sentiment. The conferences of commissioners and governors, the concurrent action of legislatures, and the various joint military expeditions made necessary by the neighborhood of common foes, were the most practical of lessons in the value of union. The first of these conferences, held in New York in 1690 by commissioners appointed by the New England colonies and New York, amounted to but little; still it prepared the way for others more formidable and significant. The French and Indian War, 1755-1763, materially weakened the sense of dependence upon England, and developed the sentiment of common interest and power.

135. **The Albany Congress of 1754.**—In 1754, when England was on the verge of war with France, the Board of Trade recommended the colonies to hold a congress to treat with the Six Nations, and form a league for their common protection. In conformity with this recommendation, commissioners from seven colonies met at Albany, June 19, 1754, forming the first of the American Congresses. After negotiating the desired treaty with the Indians, this body recommended to the colonies and to the home government a Plan of Union that had been drawn up by Dr. Franklin. This plan contemplated a common government administered by a President-General appointed by the crown, and a Grand Council chosen by the colonial assemblies. It failed to receive the necessary ratification both in America and in England, but for very different reasons. The colonists thought it contained too much of the royal prerogative, while the Board of Trade thought it too democratic.

136. **The Stamp-Act Congress.**—The colonial policy that the home government pursued, and particularly the enactment of the Stamp Act, brought together in New York, October 7, 1765, the Congress that bears this name, consisting of twenty-eight members from nine different colonies. Its object was to consider the state of colonial affairs. It adopted an address to the king, a petition to the House of Commons, and a declaration of rights—the whole forming a vigorous statement of American claims, and a strong protest

against the course of the home government. No immediate impression was produced, but soon afterwards the Stamp Act was repealed. While this Congress failed to shake the crown and Parliament in their determination to tax the colonies, it still tended strongly to unite the colonies and to prepare the way for future coöperation. It has been called the day-star of the American Union.

137. **The Congress of 1774.**—The persistence of the British Government in its chosen policy led to this Congress. It sat in Philadelphia from September 5 to October 26, 1774, and contained representatives from all the colonies but Georgia. Its object was to advise, consult, and adopt such measures as would tend to extricate the colonies from their difficulties and restore harmony with the mother country. It adopted a declaration of rights, and addresses to the king, to the British people, to the people of the colonies, and to the people of Canada; and also recommended the colonies to sunder commercial relations with England and her dependencies, unless their grievances should be redressed. It commended Massachusetts for her resistance to the objectionable acts of Parliament, and declared that, in case the home government persisted in carrying these acts into effect, all America ought to support Massachusetts in her opposition. It also recommended the holding of another Congress the next year. The recommendations of this Congress were of far-reaching effect. John Adams called the Non-Importation Agreement that it drew up, which was duly ratified, "the memorable League of the Continent in 1774, which first expressed the sovereign will of a free nation in America."

138. **The Congress of 1775.**—All the colonies were represented in the Congress of 1775. When it met at Philadelphia, May 10, it found the state of affairs greatly changed from the preceding year. The battle of Lexington had been fought, and Boston was beleaguered by a patriot army. The Congress at once assumed the direction of the armed resistance to British power. On June 15, it chose Washington General of all the Continental forces raised or to be raised for the defense of American liberty, and on the 17th it gave him a commission in which it called these forces "the Army of the United States." On June 22 it resolved to emit bills of credit for the defense of America, and pledged the Confederated Colonies to their redemption. In a word, Congress assumed all the powers of sovereignty deemed essential to the maintenance of the National cause. It continued in session until August 1, when it adjourned until September 5.

139. **The Continental Congress.**—The Congress of 1774 was first called the General Congress and the Congress at Philadelphia. In December of that year the Massachusetts legislature called it the

Continental Congress, and the country at once adopted that name. For a time men recognized different Continental Congresses, as the first and second, but this practice ceased as soon as Congress became a permanent body. And it was this Congress, recognized as the grand council of the new nation, that cut the tie which bound America to England.

140. **The Union Established.**—This review shows that an American Union had occupied increasing attention on both sides of the Atlantic for many years. It shows, also, the presence of powerful forces steadily working in that direction. "The whole coast, from Nova Scotia to the Spanish possessions in Florida, was one in all essential circumstances; and there was only the need of some sudden shock to crystallize it into a real political unity." This shock came in 1775, and the elements crystallized, although in quite a different way from any that had been contemplated. In fact, this union dates from the time when Congress adopted the army that was besieging Boston, June 15, 1775, but for formal purposes it is better to date from the Declaration of Independence.

141. **The New Political Vocabulary.**—The progress of political events, especially toward the last, was marked by the gradual introduction of a new political vocabulary. At first the terms in current use expressed only colonial conditions and relations. But by the time that we reach the Revolution, we find a large family of terms expressing quite another order of ideas, the terms, viz., nation, national, union, confederation, general government, country, countryman, America, American, the United States, continent, continental, and United America. This became the current speech of the times, and no student of political history can mistake its significance.

CHAPTER V.

THE CONTINENTAL CONGRESS, 1775–1781.

REFERENCES.

I. GENERAL.—Bancroft, Hildreth, Winsor, Johnston, Frothingham, Hart, Curtis, Wilson, last references; Green, II.–IV.

II. SPECIAL.—*Journals of the American Congress 1774–1788; Secret Journals of the American Congress 1774–1788;* Jameson, "The Predecessor of the Supreme Court," and Guggenheimer, "The Development of the Executive Departments," in *Essays in the Constitutional History of the U. S.*, edited by J. F. Jameson.

Thorough study of the period 1774–1789 is impossible without constant resort to the lives and writings of the principal actors of the period. A general reference is here made to the volumes of the *American Statesmen* series that fall within these limits, viz.: *Hamilton, Jefferson, Madison, John Adams, John Marshall, Samuel Adams, Patrick Henry, Gouverneur Morris, Washington, Franklin,* and *Jay.*

142. **Source of its Powers.**—The Congress was not the creature of law but of revolution. The question whether there should be such a body was never submitted directly to the people, but was rather decided by the colonial Assemblies, conventions, and committees that appointed the delegates who formed the Congress of 1774. These bodies acted as they believed the people whom they represented wished them to act; while the people gave the Congress the most practical kind of approval by carrying on for eight years a wasting war under its leadership and direction. Accordingly, the Congress was a National assembly called into existence by a national crisis.

143. **No Written Constitution.**—The powers and functions of Congress were not defined in a written constitution. This was impossible in the nature of the case. The public will was the measure as well as the source of its

powers, as in the case of other revolutionary governments. "It is a maxim of political science, that, when such a government has been instituted for the accomplishment of great purposes of public safety, its powers are limited only by the necessities of the case out of which they have arisen, and of the objects for which they were to be exercised. When the acts of such a government are acquiesced in by the people, they are presumed to have been ratified by the people. To the case of our Revolution, these principles are strictly applicable throughout. The Congress assumed at once the exercise of all powers demanded by the public exigency, and their exercise of these powers was acquiesced in and confirmed by the people."[1]

144. **Constitution of Congress.**—Previous to the American Congress, congresses had been composed of the representatives of independent states met together to transact international business. No purely national body, as a legislature, had ever been so called. As the colonies were separate societies, and as the business to be done was to consider their common interests, they naturally adopted this name. At first, the delegates were appointed by the colonial Assemblies, conventions, or committees of correspondence, but after the body became permanent they were appointed by the Assemblies. Every State appointed as many delegates, and for such time, as it saw fit. It also fixed and paid them their compensation. There was no uniformity in the period of service or in pay. Congress had no limitation as to time, but was a continuous body, although not in continuous session. Fifty-six members signed the Declaration of Independence, and that, in the early days, was about the number commonly present. Every State had one vote, and no more, and this was determined by a majority of its delegates present.

145. **The Powers of Congress.**—The powers exercised by Congress related to the prosecution of the war and to

[1] Curtis, *History of the Constitution*, Vol. I., p. 40.

certain other general interests. Congress controlled the national army and navy and managed Indian affairs. It created a national currency and established a general post office. It resolved that it would be very dangerous to the liberties and welfare of America if any colony should separately petition the king or either House of Parliament, and it accordingly assumed the whole direction of foreign affairs. Congress also frequently recommended the States to do certain things that it had not itself power to do. In times of special emergency, it assumed unusual authority. Twice it voted powers to Washington that made him a virtual dictator. As things once done became precedents, there grew up a customary or unwritten national constitution. For example, Congress adopted, September 6, 1774, the following rule in relation to voting: "Resolved, That in determining questions in this Congress, each colony or province shall have one vote. The Congress not being possessed of, or at present able to procure proper material for ascertaining the importance of each colony." This rule once adopted was never changed until 1787, and then only after a struggle that nearly broke up the Union.

146. **The Articles of Confederation.**—It was clear to the discerning from the outset that the Union, if it was to be permanent, required some more regular and stable government than a revolutionary assembly. For example, Dr. Franklin, as early as June 12, 1775, submitted to Congress a draft of Articles of Confederation and Perpetual Union, but no action was taken. On June 12, 1776, the same day that it appointed the committee of five to prepare a declaration of independence, Congress appointed a committee of one from each colony "to prepare and draft the form of a confederation to be entered into," and a month later this committee submitted a report in the handwriting of its chairman, John Dickinson, then a delegate from Delaware. This report, variously amended, became the Articles of Confederation adopted by Congress, November 15, 1777. But as Congress could not, in such a matter, bind

the States, it sent the Articles to the States with an urgent recommendation that they promptly authorize their delegates in Congress to ratify them. Some of the States at once complied, others hesitated. On March 1, 1781, the Maryland delegates ratified the Articles, being the last to do so. By this act the Confederation of the States was completed. Dr. Von Holst has said: "Until the adoption of the Articles of Confederation by all the States, Congress continued a revolutionary body, which was recognized by all the colonies as *de jure* and *de facto* the national government, and which as such came into contact with foreign powers, and entered into engagements, the binding force of which on the whole people has never been called in question."[1]

[1] *Constitutional History of the United States, 1750-1833*, p. 5.

CHAPTER VI.

THE CONFEDERATION, 1781–1789.

REFERENCES.

I. GENERAL.—Bancroft, Vol. VI. ("The Formation of the American Constitution," I.); Story, Book II., Chaps. II.–IV.; Hildreth, Vol. III.; Winsor, Vol. VII., Chap. III.; Wilson, *The State,* XI.; Frothingham, Chap. XII.; Curtis, Books II., III.; Johnston, *The United States,* V., and "Confederation, Articles of," in Lalor; Cooley, *Principles of Constitutional Law,* Chap. I.; *Journals of Congress,* same as in last chapter; Hart, Chap. V.; McMaster, *History of the People of the U. S.,* Vol. I., Chaps. I.–III.; Schouler, *History of the U. S.,* Vol. I., Chap. I., First Section.

II. SPECIAL.—The best account of the financial phase of this period, which is in some respects the most important one of all, is that given by Sumner, *The Financier and the Finances of the American Revolution.*

147. Source of the Powers of the Confederation.—The Articles of Confederation were framed by Congress and ratified by the State legislatures. As neither Congress nor the legislatures had been previously empowered to do anything of the kind, these acts were revolutionary acts, and, like the declaration of independence and the war, rested at last upon the approval and support of the people of the States. The Confederation was created by their agents, and existed with their approval and support.

148. Name and Nature of the New Government.—The new constitution was entitled, *Articles of Confederation and Perpetual Union between the States.* Article I. reads: "The style of this Confederacy shall be, 'The United States of America.'" Article III.: "The said States [the thirteen are all enumerated in the preamble] hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their

mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever." Article II. reads: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled." But this by no means made the States full and absolute sovereigns; for the Articles proceeded to confirm the National Government in the high powers of sovereignty that it had exercised in 1775 and 1776, and had continued to exercise down to the day when they went into effect. Certain prohibitions utterly inconsistent with the idea that they were each sovereigns, either as societies or governments, were also laid upon the States. Still the Union was a confederation or *Staatenbund*, not a federal state or *Bundesstaat*.

149. **The Confederate Congress.**—The new government was a Congress that held annual sessions. Each State sent not less than two delegates, nor more than seven. The legislatures elected delegates to serve one year, but could recall them at any time and send others in their places. No man could serve as a delegate more than three years out of every six. Each State paid its own delegates. Each State had one vote, which was determined by the majority of its delegates present when the vote was given. If the delegates were evenly divided, the State lost its vote. No question except to adjourn could be carried without a majority of all the States, and the most important questions, enumerated in Article IX., required the vote of nine States. Congress could also appoint a Committee of the States, consisting of one from each State, to exercise such of its own powers as Congress should commit to it, in the recess of that body, which, however, must not continue beyond six months. No man could serve as president of Congress more than one year in any three.

150. **Powers of the Confederation.**—The powers of the

Confederation were all expressly delegated. The most important are these: the sole and exclusive power of determining on peace and war; sending and receiving ambassadors; entering into treaties and alliances; establishing rules governing captures on land and water; granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies on the high seas; establishing courts of final appeal in all cases of captures; deciding, on appeal, disputes between the States concerning boundaries and jurisdiction; regulating the alloy and value of coin struck by Congress, or by the States; fixing the standards of weights and measures; regulating trade and managing all affairs with the Indians, not members of States; establishing and regulating post offices from State to State; appointing all officers in the land forces, above regimental officers, and all naval officers in the national service, and commissioning both classes.

151. **Commands to the States.**—The States should send delegates to Congress and maintain them. They should contribute money to the national treasury and men to the national army, as Congress should apportion to them the one or the other according to the prescribed rules. No State, without the consent of Congress, should hold any diplomatic intercourse with foreign powers; or enter into any alliance with any other State without such consent; or lay any impost or duty interfering with the stipulations of any treaty entered into by Congress with a foreign power; or keep vessels of war or troops in time of peace except such as Congress should approve; or engage in war unless actually invaded; or issue letters of marque or reprisal except in case of a power against which Congress had already declared war. Every State should abide by the determinations of Congress on all delegated questions. The Articles of Confederation should be observed by every State, and the Union should be perpetual. But no alteration in the Articles should be made unless such alteration should be agreed to in a Congress of the United

States, and be afterwards confirmed by the legislatures of every State.

152. **The Continental and Confederate Governments.** — The powers delegated to the new Congress were much the same that the old one had exercised; while the prohibitions on the States, and the commands to them, had already been practically fixed by common consent. The customary constitution that controlled the Continental Congress and the Articles of Confederation were developed at the same time, and were in substance the same thing. The only practical difference between the two governments was the lack of a written constitution in the first case, and its presence in the second. It is not surprising, therefore, that some writers should consider the Articles a mere incident, and so extend the Continental period to 1789. So we may well treat the two Congresses as one government.

153. **Organization.**—The government was extremely simple. It was a legislature consisting of one house, but it also exercised some executive and judicial powers. The President of Congress, sometimes called simply the President, while in no sense an executive head of the government, was still an officer of much dignity; he received a compensation from the national treasury, and gave his title to the present chief magistrate of the republic.

154. **Executive Departments.**—Congress being suddenly called upon to carry on an extensive war, was compelled to create administrative machinery. There were, for a time, many Congressional committees charged with administrative duties. There were committees to purchase clothing for the army, to promote the manufacture of muskets and bayonets, to collect salt, to collect lead, etc., as well as committees to consider the state of trade, to draft resolutions and addresses, and to report a device for a national seal. But as it became apparent that efficient administration could not be secured by this means, there began to appear the outlines of executive departments. In 1775 three departments of Indian affairs, to be adminis-

tered by commissioners appointed by Congress, were created. The same year Dr. Franklin was appointed Postmaster-General. Other departments also appeared that will be mentioned in another place.

155. **Defects of the Government.**—The defects of the government of the Confederation arose in part from its organization. Its legislative, executive, and judicial powers were all united in one body. But the most serious defect was the feeble powers with which Congress was clothed. It acted upon States, not upon individuals; and States it could not coerce. It could issue its requisitions for men and money in accordance with the Articles; but if the States did not raise the men and money, the army was not recruited and the treasury was left empty. It had no power to regulate commerce with foreign nations or between the States. It could negotiate treaties, but had no power to enforce them either at home or abroad. Nine States were necessary to carry the most important measures; and as every State was necessary to make even the slightest change in the Articles, to strengthen the government was found a practical impossibility. The war over, there began what has been appropriately called the critical period in American history.

156. **The Question of 1786.**—Some men regarded the failure of the impost proposed in 1785 as the collapse of the Confederation. Mr. Justice Story, describing the outlook then presented to the country, says: "The Confederation had at last totally failed as an effectual instrument of government;" "its glory was departed, and its days of labor done;" "it stood the shadow of a mighty name;" "it was seen only as a decayed monument of the past, incapable of any enduring record;" "the steps of its decline were numbered and finished;" and "it was now passing to the very door of that common sepulcher of the dead, whose inscription is *Nulla vestigia retrorsum.*"[1] A very plain question was now presented to the American people. This

[1] *Commentaries on the Constitution*, § 270.

was whether they would strengthen the Union, or would drift into disunion, anarchy, and war. Happily the defects of the Confederation had at last taught their lesson.

But before we take the next step forward, we may review this period more thoroughly.

157. Weakness in the War.—"Tradition has fastened upon the sufferings at Valley Forge; but the sufferings of the next two or three winters were not less, and the distress and nakedness of the Southern army up to the end of the war were shocking in every point of view. In 1780 the French were obliged to help the American army with provisions. The point of this for our present purpose, however, lies in the fact that there was plenty all about, and the people were not paying any war-taxes at all. There was no general distress or poverty. Except at the seat of war for the time being, the war did not press on the people in any way. The whole trouble lay in the lack of organization by which to bring the resources which existed in ample abundance into application to the necessities."[1]

158. State of the Government.—When the pressure of common dangers was removed, the state of the government became humiliating in the extreme. In October and November, 1781, Congress called upon the States for $8,000,000; up to January, 1783, only half a million had been received. Between 1782 and 1786 it called for $6,000,000; it received only $1,000,000. At last the national income dwindled to one or two hundred thousand dollars a year, and contributions were limited to New York and Pennsylvania alone. As a consequence, Congress could neither pay the large foreign debt that it had created, principal and interest, nor the soldiers on the disbanding of the army, save in certificates of indebtedness. The Continental currency ceased to have assignable value. Congress could not compel England to observe the terms of the treaty of peace, or, what was worse, keep them itself. Hence it was not strange that it could not negotiate commercial treaties with foreign nations that would have been of the greatest benefit to the country.[2]

---

[1] Sumner, *Alexander Hamilton*, pp. 87, 88.

[2] The hopeless financial breakdown Fisher Ames once described in a sentence: "The government of a great nation had barely revenue enough to buy stationery for its clerks, or to pay the salary of the door-keeper." A contemporary writer quoted by Story gives this fuller description: "The United States in Congress have exclusive power for the following purposes, without being able to execute one of them. They may make and conclude treaties; but can only recommend the observance of them. They may appoint ambassadors; but cannot defray even the expenses of their tables. They may borrow money in their own name on the faith of the Union; but cannot pay a dollar. They may coin

159. Dissolution of Congress Threatened.—At first the Continental Congress commanded great respect both at home and abroad. The States were all represented, and by their ablest men. But such did not long continue to be the case. Congress fell off in numbers and in character. This decline continued to increase as the difficulties of the government increased, and as the States became more and more absorbed in their own affairs. Sometimes States did not even take the trouble to elect delegates. Sometimes the delegates who were appointed did not attend, or attended but a small part of the time. Frequently not enough States were present to transact business. The whole country desired peace above all things, but, for want of a quorum, it was not until January 14, 1784, that the treaty of peace, signed September 3 of the previous year, could be ratified, and then there were but twenty-three members present. A single negative vote given by Connecticut, Rhode Island, Delaware, Maryland, North Carolina, or South Carolina would have defeated the ratification of the treaty. Only eighteen delegates representing eight States were present when the Ordinance of 1787 was passed. It was with the greatest difficulty that delegates enough could be brought together in 1788 to set in motion the government created by the Constitution. And finally, not enough members attended formally to adjourn when the end came, and the Old Congress fell to pieces and left the country without a government from October, 1788, to April, 1789.

160. State of the Country.—The state of the country was no better than the state of the government. The State governments were efficient, but they could not take the place of a National government. Political confusion, industrial derangement, commercial distress, and social disorder abounded. The mass of private debts was very great. In some States, and notably in Massachusetts, men who felt the crushing weight of debt—some of whom had done faithful service as soldiers in the war—joined with the reckless and disaffected classes in threatening the peace of society, and even in promoting rebellion. The States regulated commerce regardless of the interests of neighboring States and of the country as a whole. Goods shipped from one State to another were subject to duty. State discriminated against State. There was great scarcity of money; in some States it disappeared from circulation altogether, while commodities, as whisky and tobacco, became the medium of exchange. And then, as though the Continental money had not caused sufficient distress, several States fell to issuing irredeemable

---

money, but they cannot purchase an ounce of bullion. They may make war and determine what number of troops are necessary, but cannot raise a single soldier. *In short, they may declare everything, but do nothing."*—*Commentaries*, § 246.

paper currency. With all the rest, several States had serious disagreements as to boundaries and territorial claims; there was a sharp issue as to the disposition to be made of the Western lands; while the people beyond the Alleghany Mountains threatened to cut loose from the Union, and either attach themselves to Spain or create a new nation in the Mississippi valley.[1] The farther men got away from the war, the weaker the government became, and the more distressful the state of the country.

161. **Causes of the Situation.**—Wise statesmen did not differ as to the causes of the existing state of affairs, or as to the needed remedy. The radical vice of the Confederation, Hamilton said, "was the principle of legislation for States as governments in their corporate or collective capacities, and as contra-distinguished from the individuals of whom they consist." Washington said: "It is indispensable to the happiness of the individual States, that there should be lodged somewhere a superior power to regulate and govern the general concerns of the Confederated Republic, without which the Union cannot be of any duration." To a correspondent who urged the use of "influence" to check the disorders in Massachusetts that led to Shays's rebellion, he wrote: "Influence is not government. Let us have a government by which our lives, liberties, and properties will be secured, or let us know the worst."

162. **Attempts to Strengthen the Government.**—In 1781, before the Articles went into operation, Congress asked the States for power to levy a five per cent. *ad valorem* duty on imports. Rhode Island refused outright, and Virginia withdrew the consent that she had at first given. In 1784 Congress asked the States for power to prohibit, for fifteen years, the entrance into the country of vessels belonging to a foreign country not having a commercial treaty with the United States. Ten States gave the power conditionally, and three refused altogether. In 1785 Congress asked for a grant of power to levy duties on imports for twenty-five years, the States themselves to appoint the revenue officers, who should be accountable to Congress. All the States but Rhode Island formally complied, but New York did so on conditions equivalent to a refusal, and so the plan was defeated. As Von Holst tells us, "Congress was viewed in the light of a foreign power, spite of the fact that it was composed of delegates from the body of the people."

163. **Causes of the Failures.**—The ultimate causes of the defects of the government and of the failures to remedy them, lay in the current sentiments and habits, ignorance and passions, of the people. They were slow to see the sources of the prevalent evils,

[1] See Hinsdale, *The Old Northwest*, Chaps. XI.-XIII. Some account of these controversies are given in this work, Chap. XLI.

and slower still to see the necessary remedy. Having but recently escaped from the evils that one strong government had inflicted upon them, they were not in haste to set up another strong one. Some thought King George as good a king as "King Cong." The problem to be solved was really one of great difficulty, involving the adjustment of the State and General Governments. The States were often narrow-minded and jealous. There was an excess of State pride, and a sad lack of National feeling. Federal government was little understood. Few men saw that legitimate trade is mutually advantageous; and States legislated on the principle that the true way to build up themselves was to pull down their neighbors. And finally, there were men of influence who acted from no general principles whatever, but from motives of pure selfishness,—men who believed that they would better thrive in business or politics in the midst of confusion and distress than in the midst of peace and prosperity.

164. **Loss of the Favorable Opportunity.**—The favoring opportunity to form a vigorous national government had been lost. That opportunity came in the years 1775 and 1776, when the people were in the full flush of patriotic ardor; when Congress had great authority and prestige; and when the States had not yet seized certain powers that they now held so stubbornly, and that they finally yielded to the Union only from stern necessity. Few more significant facts were stated in the Federal Convention of 1787 than those contained in this extract from a speech by Mr. James Wilson, of Pennsylvania:

"Among the first sentiments expressed in the first Congress, one was that Virginia is no more, that Massachusetts is no more, that Pennsylvania is no more, etc.; we are now one nation of brethren; we must bury all local interests and distinctions. This language continued for some time. The tables at length began to turn. No sooner were the State governments formed than their jealousy and ambition began to display themselves. Each endeavored to cut a slice from the common loaf to add to its own morsel; till at length the Confederation became frittered down to the impotent condition in which it now stands."[1]

165. **Future Political Parties in Embryo.**—At the beginning of the Revolutionary struggles the country was sharply divided into the Patriots or Whigs and the Loyalists or Tories. In the end, the Tories were utterly overwhelmed. But in the midst of the struggle, the Whigs began to divide into two sections or parties. And, inevitably, this division had reference to the powers that the General Government should exercise. It was a sort of revival of the old

[1] Elliot, *Debates*, Vol. V., p. 172.

controversy between the colonies and the crown, and a distinct anticipation of the political parties of later years. The dispatches of the French ministers at Philadelphia to Paris contain frequent references to the bitter contentions of the National and State parties.[1] One was the party of Washington, Franklin, Jefferson, Hamilton, and Madison; the other of John Adams, Samuel Adams, Richard Henry Lee and Arthur Lee. Mr. Jefferson went so far as to hold that Congress had authority to coerce a State to pay its quotas to the treasury.

---

[1] Durand, *Documents on the American Revolution*, p. 194.

CHAPTER VII.

THE FEDERAL CONVENTION CALLED.

REFERENCES.

I. GENERAL.—Bancroft, Vol. VI. ("The Formation of the American Constitution," II.); same author, *History of the Constitution*, Chaps. VII., VIII.; Hildreth, Vol. III.; Winsor, Vol. VII., Chap. IV.; Curtis, Book III., Chaps. VI., VII.; Frothingham, Chap. XII.; Cooley, same as in last chapter; Johnston, same as in last chapter, also "Convention of 1787," in Lalor; Fiske, *The Critical Period of American History;* Von Holst, *Constitutional and Political History of the U. S., 1750–1828;* McMaster, Vol. I., Chap. IV.; Schouler, Chap. I., Section 2.

II. SPECIAL.—The principal documents relating to the calling of the Convention, with notes, are found in Elliot's *Debates*, Vol. I. Many of them are contained in Bancroft's and Curtis's histories of the Constitution. See also *Journals of Congress*, Vol. IV., and the Introduction to J. C. Hamilton's edition of *The Federalist.*

166. Conference at Alexandria.—In March, 1785, commissioners appointed by Maryland and Virginia met at Alexandria to frame a compact concerning the navigation of Chesapeake Bay and the other waters that belong to those States in common. Mount Vernon is near by, and they naturally conferred with its distinguished master. Not only was Washington alive to the pending scheme, but he was also deeply interested in the improvement of the navigation of the Potomac and James Rivers, in connecting the waters of the seaboard and those of the interior by transit lines, and in uniform customs duties and a uniform currency for the two States. He urged these ideas on the commissioners. In time the commissioners made reports to their respective legislatures concerning the better regulation of the navigation of the Bay and the Potomac. It was seen at once, as it had been seen at Alexandria, that

the two States alone could not carry out the plan reported, much less the large ideas suggested by Washington. Other States must coöperate.

167. The Virginia Resolution.—On January 21, 1786, the Virginia legislature, after considering the subject discussed at Alexandria, adopted a resolution naming eight commissioners who, or any five of whom, should meet such commissioners as might be appointed by the other States, at any time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far uniformity in their commercial regulations might be necessary to their common interest and their permanent harmony; and to report to the several States such an act relative to this great object as, when unanimously ratified by them, would enable the United States in Congress assembled effectually to provide for the same. The commissioners were instructed immediately to transmit to the several States copies of this resolution, with a circular letter requesting their concurrence therein, and proposing a time and place for meeting.

168. Convention at Annapolis.—Twelve commissioners, representing the States of New York, New Jersey, Pennsylvania, Delaware, and Virginia, in pursuance of this call, convened at Annapolis, September 11, 1786. Some other States appointed commissioners who failed to appear. The twelve commissioners saw clearly that nothing effectual could be accomplished in the line marked out by the Virginia resolution, without a fuller representation of the States. They saw, too, that trade was intimately connected with other subjects, and could not be regulated without setting them in order. Fortunately, New Jersey had empowered her commissioners to consider "other important matters"[1] as well as trade; and the convention,

[1] "In the last and best history of the Constitution, in its more than a thousand pages, only a single phrase, and that in three words, is printed wholly in capital letters. It is OTHER IMPORTANT MATTERS."—President Austin Scott.

catching at the phrase, adopted a report, drawn by Alexander Hamilton, recommending a general convention of the States to digest a plan for strengthening the General Government. This recommendation was, that a convention should meet at Philadelphia on the second Monday in May, 1787, "to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same."

This report was addressed to the legislatures of the five States, but copies of it were also sent to Congress and to the governors of the eight States that were not represented.

169. **The Action of Congress.**—The Articles of Confederation could be altered only by the joint action of Congress and of every one of the thirteen States. They made no provision for a convention as a part of the machinery for effecting such alteration. Had the convention at Annapolis recommended changes in the Articles, it would have submitted them to the States appointing its members. Congress would naturally be jealous of any convention that, uninvited, should recommend such changes. The convention had sent its report to Congress for its information, from motives of respect, but it had not asked that body to take any action in the premises. Congress adopted, however, as of its own motion, the idea of holding a general convention. On February 21, 1787, studiously avoiding any reference to the proceedings at Annapolis, but referring to similar recommendations made by individual States, that body adopted, with a suitable preamble, this resolution:

"Resolved, That, in the opinion of Congress, it is expedient that on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and

express purpose of revising the Articles of Confederation, and reporting to Congress and the several Legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."

170. **The Action of the States.**—In pursuance of the foregoing resolution, the legislatures of twelve States elected such number of delegates to the convention at Philadelphia as they severally chose. The Rhode Island legislature was opposed to the whole movement and took no action whatever.

NOTE.—The foregoing recital shows that the master cause of the convention of 1787 was the commercial derangement of the country. Reviewing this ground, Mr. Justice Miller has said:

"It is not a little remarkable that the suggestion which finally led to the relief, without which as a nation we must soon have perished, strongly supports the philosophical maxim of modern times — that of all the agencies of civilization and progress of the human race, commerce is the most efficient. What our deranged finances, our discreditable failure to pay our debts, and the sufferings of our soldiers could not force the several states of the American Union to attempt was brought about by a desire to be released from the evils of an unregulated and burdensome commercial intercourse, both with foreign nations and between the several states."— *Memorial Oration at the Centennial Celebration of the Constitution*, Philadelphia, September 17, 1887.

CHAPTER VIII.

WORK BEFORE THE CONVENTION.

REFERENCES.

I. GENERAL.—Elliot's *Debates,* Vol. I. (containing Journal of the Convention) and Vol. V. (containing Madison's reports of the debates). Also *Papers of James Madison,* Vol. III. ("Debates in the Federal Convention," etc.).

II. SPECIAL.—Bancroft, Vol. VI., ("The Formation of the American Constitution," III.), and *History of the Constitution;* Hildreth, Fiske, Johnston, Cooley, same as in last chapter; Von Holst, Chap. I.; Story, Book III., Chap. I.; Frothingham, Chap. XII.; Winsor, Vol. VII., Chap. IV.; Pitkin, Chaps. XVIII., XIX.; Hart, Chap. VI.; Schouler, *History of the U. S.,* Chap. I., Sec. 2; McMaster, Vol. I., Chap. IV.; Burgess, *Political Science, etc.,* Book III., Chap. II.

For a popular purpose, the best book that deals with the Constitutional era is Fiske's *Critical Period of American History.*

171. **Meeting and Organization.**—On the day fixed, May 14, 1787, a number of delegates to the Federal Convention met at the Statehouse in Philadelphia, but a majority of the States was not present until the 25th, when an organization was effected. Washington was unanimously chosen president and William Jackson secretary.

172. **Groups of Questions.**—When the Convention came to debate and to vote, it was discovered that the members differed widely in opinion on many subjects. Still, the multitude of issues that arose, first and last, can be divided into three groups: (1) questions relating to the organic nature of the government, or to the source of its powers and the mode of its operation; (2) questions relating to the internal construction of the government considered as an organism or machine, its model or framework; (3)

questions relating to the powers of the government, or the functions that it should perform.

173. **Relations of the Questions.**—These groups of questions were at once closely related, and yet quite distinct. The National Government could be based directly on the people rather than on the States, and at the same time consist of a congress of one house and be limited to a narrow field of operations; or a congress of one house, elected by the States, could be clothed with ample powers and act immediately on the people through its agents; or a government of three departments, with a congress of two houses, could be organized. At the same time, the "strong" elements tended to affiliate, and so did the "weak" ones. Mr. Dickinson said to Mr. Madison: "Some of the members from the small States wish for two branches in the general legislature, and are friends to a good National government; but we would sooner submit to a foreign power than submit to being deprived of an equality of suffrage and thereby be thrown under the domination of the larger States."[1]

174. **Nature of the Government.**—In the discussions of the Articles of Confederation in 1776-1777, an issue had arisen involving the large and the small States. Virginia, Pennsylvania, and Massachusetts, which together had about one half the population of the Union, were dissatisfied with the rule adopted in 1774, giving the States an equal suffrage in Congress. They strove to secure the adoption of a new rule which should give the States power in proportion to their importance, and proposed population as the basis of representation. This plan the other States defeated. But out of this feeling, which had grown with the growth of State power, sprang the question that most troubled the Convention of 1787. It was simply whether the Federal Government should spring directly from the States as political corporations, or directly from the people

[1] Elliot. *Debates*, Vol. V., p. 191, Note.

of the States. Should representation be equal, or be according to the importance of the States as measured by their population, or some other standard to be agreed upon?

175. **The National Party.**—According to the resolution of Congress, the sole purpose of the Convention was to propose such a revision of the Articles of Confederation as should render the Federal Constitution adequate to the exigencies of government and the preservation of the Union. But as the Virginia and Maryland commissioners at Alexandria had found it impossible for those States alone to regulate the navigation of their common waters; and as the Annapolis Convention had found it impossible for all the States to regulate trade separate and apart from other important matters, so now some delegates believed that no mere revision of the Articles would be adequate to the exigencies of government and the preservation of the Union, and held that a new constitution based on new principles was necessary. They therefore proposed a National system, comprehending these ideas: A government emanating directly from the people; proportional representation; three branches and a bicameral legislature, and ample powers exercised by National officers. These men were called the National party, the Thorough-revision party, and the Large-State party.

176. **The State Party.**—Some delegates opposed all these ideas; others opposed the first two, and particularly proportional representation. These all favored what they called "a State system," the central idea of which was an equal suffrage in Congress. Some of them, however, were quite willing that the framework of the government should be altered, if only the States should have equal power in it. This second group was called the State, the Small-State, and the Slight-revision party.

177. **The Fundamental Question.**—The fundamental question was, the National idea or the State idea. National men said it was un-republican for the 37,000 people of Delaware to have the same weight in the Union as the

half million of Virginia. State men replied that the Union was a confederation, that a confederation assumed sovereignty in its members, and that sovereignty implied equality. The first rejoined that they favored a National system; and then the second responded that they would never consent to such a system. Mr. Paterson declared that, with proportional suffrage, the large States would swallow the small ones; Dr. Franklin replied that the large States neither would or could combine to swallow the small ones, and that with equal suffrage it was as much in the power of the small States to swallow the large ones. The small States did not care so much about the powers of the National Government, or even its framework, as they did about the absorption of those powers by the large States, which they declared a proportional suffrage would make inevitable. Hence, the contention was not so much about powers as about the hands that the powers should fall into. The fact that an equal vote had been the rule since the Union began, gave the State party a decided advantage. With this question two others were affiliated, viz., the representation of property and supplies for the treasury.

178. **Representation of Property.**—Some men thought the government should also be based, in part at least, upon wealth. Property, they said, had rights as well as persons. The British House of Commons rested to a great extent on this basis. Some of those who took this view thought suffrage in Congress should be in proportion to contributions to the National treasury; others, that is should be in proportion to the wealth of the States.

179. **Supplies for the Treasury.**—It was generally agreed that Congress should have power to levy customs duties. But it was supposed that these would be insufficient; that direct taxes, or requisitions on the States, would be necessary; and so the question arose how these taxes should be apportioned. Should the apportionment be according to the population of the States? or according to property? or be equal? And if according to population,

should the rule be the white population, the free population, or the total population? State men were not in favor of an equal tax; while National men naturally asked why the tax should not be equal as well as the vote. These questions were not new; they had vexed Congress when framing the Articles of Confederation.

180. **Framework of the Government.**—In regard to the framework or model of the government,— its internal construction considered as a machine (p. 91),—it was proposed by some that the government should consist of a legislature alone, and this of but one house. This was merely retaining the old framework. Another proposition was, a government of three independent branches, and a congress of two houses. Besides these principal questions there were many minor ones that fall into the same group, as: How shall the President and Vice President be chosen? What shall be their duties? and How shall the Judiciary be organized?

181. **Powers of the Government.**—At one extreme of the Convention stood a few men who desired as much as possible to centralize powers, and to leave the States a minimum; at the other extreme, a larger number who did not favor giving the Union any considerable increase of powers; between the two extremes stood a third class who were desirous of materially strengthening the government, but by no means agreeing among themselves concerning details. Two of the questions at issue will be stated.

182. **Control of Commerce.**—While the evils resulting from State control of commerce were universally felt, and were also the main cause of the Convention's being called, still the delegates were far from being a unit when they came to deal with the subject. New Jersey had proposed, when the Articles were framed, to give Congress power over foreign trade. The Northern States, which owned most of the shipping and carried on most of the commerce, were now generally anxious to have the control of commerce put into the hands of Congress; the Southern

States, which were interested in a few principal agricultural staples,— as Virginia, Maryland, and Delaware in tobacco, North Carolina in ship-stores, South Carolina in rice, and Georgia in indigo — shrank from this conclusion. They said Congress could then destroy their prosperity by putting export duties on their staple products.

183. **Slavery in the Convention.**—Slavery gave no little trouble. It existed by State authority; the Convention proposed to leave it to State regulation, but it was necessary to adjust the government of the Union to the institution. It presented two stubborn questions. North Carolina, South Carolina, and Georgia wanted their slaves counted in apportioning voting power in Congress, but did not want them counted in apportioning taxes; while many of the delegates from other States wanted to have slaves taxed, but did not want to have them represented. Then the three Southern States were also determined that the importation of negroes should not be interfered with, which was obnoxious to other States.

184. **Conflict of Interests.**—Thus were the delegates divided in opinion. Thus was the Convention cut through and through by lines that crossed one another at all angles. Seldom has a deliberative assembly been compelled to deal with elements so blended and confusing. But, after all, the hope of the Convention, and of the country, lay in this very confusion. The Large-State and Small-State parties both dissolved the moment the fundamental question of constituting the government was disposed of, and the secondary question of powers was taken up. Moreover, all the questions did not demand an answer on any one day; had they done so, the Convention must have ended in failure.

185. **The Virginia Plan.**—On May 29 Governor Randolph presented to the Convention a series of fifteen resolutions that are known as the Virginia plan. The same day [1]

[1] It is well known to historical scholars that the so-called "Pinckney plan" as found in Elliot, Vol. I., p. 129, is a document of no authority. It was

Charles Pinckney, of South Carolina, also presented a plan. These plans were considered in committee of the whole until June 13, when the first one, somewhat amended and expanded, was favorably reported to the Convention. This plan embodied the National theory in its strongest form. The Legislative branch should consist of two houses, the first elected by the people of the States for three years, the second by the State Legislatures for seven years; the Executive should be chosen by the two houses of the National legislature; the Judiciary, by the second house. The representation in each house should be according to the respective population of the States, or their quotas of contribution. This rule would have given the States of Massachusetts and Virginia twenty-six Representatives in a house of sixty-six, and thirteen Senators in a Senate of twenty-eight.

186. **The Jersey Plan.**—On June 15 Mr. Paterson, of New Jersey, as the spokesman of the small States, presented the alternative scheme, in eleven resolutions. This plan made no change in the basis of the government; it left Congress a single body, with an equal representation elected by the States. It provided a Federal Executive to be appointed by Congress, and a Judiciary to be appointed by the executive. This plan was much more definite and full with regard to powers than the one introduced by Mr. Randolph. But it must be remembered that the two statesmen were looking mainly at two different things: Randolph, at organizing a new government; Paterson, at strengthening an old one.

187. **Reaffirmation of the Virginia Plan.**—The Randolph, Pinckney, and Paterson plans were now sent to the committee of the whole, that the new one might be discussed. The committee reported, June 19, that it did not agree to the Paterson propositions, and again affirmed the

---

evidently filled in by Mr. Pinckney as the convention proceeded. See *The Madison Papers*, Vol. III., Appendix 2, and *The Writings of James Madison*, Vol. IV., pp. 172, 173, 181, 182, 338, 339, 378, 379.

Virginia plan. This action thoroughly alarmed the Small-State men and came near upsetting the Convention. The Large-State men were now at liberty to go on and frame a constitution, if they could hold together; but they knew perfectly well that any constitution approved by a vote of six States to five would be rejected. Fortunately, the distinctness of the first and second groups of questions left the Convention a door of escape, as we shall see in the next chapter.

188. Character of the Convention.—In all sixty-five delegates were appointed, but only fifty-five attended. Of these one had sat in the Albany Congress, three in the Stamp-Act Congress, seven in the Congress of 1774, nine had signed the Declaration of Independence, forty-three had been members of Congress and eighteen were members at this time. Twenty-nine had received a liberal education, either in the colleges of the country or in the universities of Great Britain. In ability, education, and political experience, the Convention represented the best elements of the country. Washington and Franklin were the two most famous members; Madison and Hamilton were the ablest political thinkers, but there were a large number of men of a high order of ability.

189. The Words "Strong" and "Weak."—The ambiguities lurking in the words strong and weak have much confused the history of the Federal Convention. To say that a man favored a strong or a weak government does not settle his status. For example, although Mr. Randolph favored a "strong government," he resisted giving Congress the control of commerce, and finally refused to sign the Constitution lest it become an instrument of tyranny. His "strong government" was one of three departments, having a bicameral Congress in which the States should be ratably represented. Mr. Paterson, and the Northern State men generally, wanted a "weak government," and yet they wished to give Congress the control of commerce. Their "weak government" was one in which the States were equally represented.

190. Composition of the Large-State Party.—The Large-State party was not composed exclusively of large States. Had it been, it could never have commanded more than three votes out of twelve. North Carolina, South Carolina, and Georgia voted, on the motions involving this issue, along with Virginia, Pennsylvania, and Massachusetts. Connecticut, New York, New Jersey, Delaware, and Maryland made up the other party. New Hampshire was not present until July 23, and Rhode Island not at any time. Had these two

States been present from the beginning, it is impossible to say what the final outcome would have been. "A more fortunate union of circumstances for even-handed compromise could hardly have been imagined. The large States had, through all the preliminary debates, a majority of six to five, large enough to insure a general run of success in nationalizing the new government, but not so large as to obviate the necessity of deference to the minority."

191. **Slavery in the Colonies.**—In 1619, the very year that Virginia won her House of Burgesses, a Dutch ship landed a few negroes at Jamestown, and with that act the history of slavery in the United States began. For a time its growth was very slow; few negroes were imported, and their natural increase was small. Afterwards, both importations and the natural increase became more rapid. The increase in the total number of slaves, as well as their distribution North and South, is shown by this table:[1]

	1715	1775	1790
North	10,900	46,120	40,370
South	47,950	455,000	657,527
Total	58,850	501,120	697,897

Generally, the colonies were opposed to the slave trade and to slavery. Statutes by the score designed to limit or prohibit the importation of slaves, are found in their statute books. But this opposition was always overborne by British traders supported by the British government. The feeling of the country is shown by a resolution adopted by Congress, April 6, 1776, three months before independence was declared: "That no slaves be imported into any of the thirteen United Colonies." Some of the States, as Virginia, had already taken the same action. In 1787 slavery had ceased to exist in Massachusetts and New Hampshire, and in the five other Northern States it was doomed to early extinction. The most enlightened Southern men looked upon the institution as a great evil to be remedied as soon as possible; and it appears to have been the general expectation in the South that the remedy would come at an early day. The industrial prosperity of the Southern States, and particularly of the two Carolinas and Georgia, for the time depended upon slave labor. It was almost universally believed that emancipation would be attended by greater evils than slavery itself. Even Mr. Jefferson, who was a strong antislavery man, said the two races, equally free, could not live together in the same government.

[1] Lalor's *Cyclopædia of Political Science*, "Slavery."

CHAPTER IX.

THE CONSTITUTION FRAMED.

See references of last chapter, to which may be added Johnston's article, "Compromises in U. S. History," I., III., in Lalor's *Cyclopædia.*

192. First Compromise.—Twice before June 15 it had been suggested that different rules of suffrage should be adopted for the two houses of Congress. No attention was paid to these suggestions at the time. On June 29 Mr. Johnson, of Connecticut, proposed that instead of longer opposing the National idea to the State idea, the Convention should combine the two,—make the suffrage proportional in the one house and equal in the other. Mr. Ellsworth, also of Connecticut, made that motion. The Union, he said, was partly national, partly federal; proportional representation in the first branch would be conformable to the national principle, and an equality of voices in the other would be conformable to the federal principle. Dr. Franklin seconded the motion. "The small States contended," he said, "that the national principle would endanger their liberties; the large States contended that the federal principle would endanger their money. When a broad table is to be made, and the edges of the planks do not fit, the artist takes a little from both and makes a good joint." This motion, sometimes called the "Connecticut Compromise," was finally adopted. With it were coupled two other propositions. The first of these, "all bills for raising revenue shall originate in the House of Representatives," was a concession to the large States. The other one, that in apportioning Representatives and direct taxes three fifths of the slaves should be counted, was a concession to the

Carolinas and Georgia. This compromise was not adopted as a whole at one time, but by separate votes, item by item. The concession of an equal vote to the small States was made irreversible. Article V. of the Constitution declares: "No State, without its consent, shall be deprived of its equal suffrage in the Senate."

193. **Effects of the Compromise.**—The adoption of this compromise was followed by two favorable results. The men most opposed to an efficient government went home in disgust; while the Small-State men, who really wanted such a government, were put in a good humor, and were ready to assist in making it as strong as was necessary. Now that they were convinced that their States would not be merged in a consolidated National plan, or their influence lost in public affairs, such delegates as Dickinson and Paterson worked side by side with Franklin and Madison in perfecting the details of the Constitution. Nothing could show more conclusively that the most radical difference of opinion related to the organic nature of the government, rather than to its powers or its framework.

194. **Second Compromise.**—The second compromise relates to commerce, and simply balances the two propositions: "Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and, "No tax or duty shall be laid on articles exported from any State." The first was a concession to the commercial States of the North; the second, to the agricultural States of the South.

195. **Third Compromise.**—The Carolinas and Georgia maintained that Congress should be prohibited from abolishing the slave trade, or taxing it more highly than other commerce. After a heated debate, which brought the Convention to a standstill as effectually as the representation question had done, the three States united with New England in carrying a new compromise. It was conceded, on the one hand, that Congress should not forbid the trade for twenty years; and, on the other, that in the

meantime Congress might impose upon the negroes imported a tax of ten dollars a head. The three States also assisted the North in striking out of the Constitution, as it then stood, a clause requiring a two-thirds vote in each house of Congress to enact navigation laws. Virginia strongly opposed this compromise. She thought the first feature would tend to perpetuate slavery, while she objected to giving the control of commerce to a majority in Congress. It was also a part of this arrangement that slaves escaping from one State into another should be given up to their masters on demand.

196. **Stages of Progress.**—Few of the steps taken by the Convention need be here reported. On July 24 the whole subject, including all the material that had been accumulated, was referred to a committee of five, called the Committee of Detail, to report a draft of the Constitution. The report of this committee, submitted August 6, bears a general resemblance to the Constitution as finally adopted. The whole ground was now gone over again; some old features were dropped, and some new ones added. On September 8 the articles already agreed to were sent to a Committee of Revision, consisting of five, for arrangement and revision of style. Four days later, the Constitution came back nearly in its present form,[1] and the proceedings entered on their final stage. Three or four days were now spent in a final revision. A few changes were made, of which the most important was the reduction of the minimum rate of representation in the House of Representatives from 40,000 to 30,000. Resolutions submitting the Constitution, and an address to Congress to be signed by the president, were agreed to. On the final vote the States present were unanimous, viz.: New Hampshire, Massachusetts, Connecticut,

[1] "The finish given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. [Gouverneur] Morris; the task having probably been handed over to him by the chairman of the committee, himself a highly respected member, and with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved."—James Madison.

New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, and Georgia. Single delegates were present from New York and Maryland, but they could not cast the votes of those States.

197. **Signing and Adjournment.**—Monday, September 17, the Convention met for the last time. The Constitution had been engrossed and was ready to be signed. Only forty-two of the fifty-five members who had attended were present, and three of these had declared themselves in opposition. In the hope that the signatures of all might be secured, a form that made the signers merely witnesses to what had been done, and did not declare their approval, had been adopted. "Done in Convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names." But the three members still refused to sign. So the thirty-nine men signed, and the Convention adjourned *sine die*.

198. **The Three Compromises.**—The history of these compromises is of the greatest interest. It reveals some of the difficulties attending constituting a federal government, and particularly a federal republic, involving, as it does, the adjustment of two jurisdictions. Secondly, it shows the skill with which, in the present case, this problem was solved. And, thirdly, it is a good illustration of the political genius of the English-speaking people, who never press an abstract principle to an extreme, but rather consult the facts of history. The first and third compromises have been denounced as compromises of a moral question. Slavery then existed in most of the States; the Convention could not abolish it, even if such were its wish; and the members generally thought it as proper a subject for compromise as any other. So far as we can now see, without these compromises no constitution would have been made, and the American Union would have fallen to pieces. Furthermore, they were made at different stages of the Convention's progress as the subjects were reached.

199. **Second Convention Proposed.**—The last few days of the Convention, the idea of calling a second convention got afloat. The Constitution provided for its own amendment after it should go into

effect, but this did not satisfy the men who brought forward this proposition. They insisted that it should be amended before going into effect, or at least that an opportunity for amendment should be given. Governor Randolph twice made that motion, and said he would vote for the Constitution if the motion were carried. Mr. Mason said in favor of one of these motions: "A second convention will know more of the sense of the people, and be able to provide a system more consonant to it." Mr. Pinckney replied: "Nothing but confusion and contrariety will spring from the experiment. The States will never agree in their plans, and deputies to a second convention coming together under the discordant impressions of their constituents, will never agree." The motion was lost by a unanimous vote.

200. Spirit of the Convention.—The three members who refused to sign were Gerry, of Massachusetts, and Mason and Randolph, of Virginia. They had all taken an active part in the Convention, and Mason and Randolph had supported the strongest features of the Virginia plan. But now that the work was finished, and they could survey it as a whole, they seemed surprised and alarmed at the long step forward that had been taken. Randolph afterwards favored the ratification of the Constitution, but Mason and Gerry opposed it to the end. The three statesmen assigned various and conflicting reasons for their final action, which called out a number of the signers in reply. Franklin said he expected no better constitution, and was not sure but this one was the best. Gouverneur Morris had objections, but considered the plan agreed upon the best one attainable. Hamilton said no man's ideas were more remote from the plan than his own; but, "is it possible," he asked, "to deliberate between anarchy and convulsion on one side, and the chance of good to be expected from the plan, on the other?" How utterly the three objectors failed to read the future, is shown by the prophecy of Mason that "the dangerous power and structure of the government" would "end either in monarchy or a tyrannical aristocracy; which, he was in doubt, but one or the other he was sure."[1]

---

[1] Mr. Madison closes his report of the debates of the Convention with this paragraph: "Whilst the last members were signing, Dr. Franklin, looking towards the president's chair, at the back of which a rising sun happened to be painted, observed to a few members near him that painters had found it difficult to distinguish in their art a rising from a setting sun. 'I have,' said he, 'often and often in the course of the session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the president without being able to tell whether it was rising or setting; but now, at length I have the happiness to know that it is a rising and not a setting sun'."—Elliot, *Debates*, Vol. V., p. 565.

201. Records and Reports.—Just before adjourning, the Convention, in response to a question by its president as to the disposition to be made of the Journal and other papers, voted that they should all be intrusted to him, subject to the order of Congress if ever organized under the Constitution. In March, 1796, Washington deposited the manuscript volumes containing them in the State Department. Mr. Madison, besides bearing an able part in the proceedings, took copious notes of the discussions, which constitute the only existing report covering the whole period of the Convention, and the principal sources of information on the subject.

CHAPTER X.

RATIFICATION OF THE CONSTITUTION.

REFERENCES.

Bancroft, Vol. VI. ("The Formation of the American Constitution," IV., V.); Hildreth, Vol. III.; Winsor, Vol. VII., Chap. IV.; Frothingham, Chap. XII.; Pitkin, Chap. XVIII.; Hart, Chap. VI.; Johnston, "Constitution of the U. S.," I.–III., in Lalor, and *The United States,* V.; Fiske, *The Critical Period of American History;* McMaster, Vol. I., Chap. V.; Story, Book III., Chap. I.; Smith, "The Movement Towards a Second Constitutional Convention in 1788," in *Essays in the Constitutional History of the U. S.,* edited by J. F. Jameson.

Elliot's *Debates,* Vols. II.–IV. These three volumes contain the reports of the debates in the State conventions called to ratify the Constitution. See also *Journals of Congress,* Vol. IV.

202. Constitution Sent to Congress.—The Constitution reached Congress September 20, 1787, accompanied by the two resolutions and the address that the Convention had adopted. This is the first of the two resolutions:

"*Resolved,* That the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification; and that each convention assenting to and ratifying the same, should give notice thereof to the United States in Congress assembled."

203. Action of Congress.—The Articles of Confederation provided that no alteration should at any time be made in them unless it were first agreed to in Congress, and were afterwards confirmed by the legislature of every State.

The document that had been framed and now lay on the table was not a series of alterations in the Articles, but a wholly new constitution; moreover, this constitution did not emanate from the States, as the Articles had done, but from the people of the United States; while the last article ran: "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." The Convention did not ask Congress to agree to anything, but only to send the Constitution to the States, and await their action. An attempt was now made under the leadership of Richard Henry Lee, of Virginia, to have Congress propose amendments, but this failed. Had it succeeded, some States would have ratified the Constitution as framed by the Convention, and some the Constitution as amended by Congress, and so it would have failed altogether.

September 29 Congress adopted this resolution by a unanimous vote:

"That the said report, namely the Constitution with the resolutions and the letter accompanying the same, be transmitted to the several Legislatures, in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention made and provided in that case."

204. Reception of the Constitution.—The Convention had succeeded in keeping its secrets. No part of the Constitution passed its doors until it had completed its work and adjourned. Immediately on its publication, the country was thrown into a fever of excitement that continued to increase until, almost a year later, the eleventh State had given its ratification. The press teemed with pamphlets, books, essays, broadsides, articles, poems, letters, allegories, and squibs. The land resounded with speeches. At first there were three classes of men: the friends of the new plan, its enemies, and those who had not made up their minds. Its ratification was due in the end to the fact that the first class were able to convert the majority of the third one.

205. Friends of the Constitution.—Mr. Curtis divides the friends of the Constitution into three classes: (1) a large body of men who recognized in the Constitution the admirable system which it proved to be when put into operation; (2) men who believed it to be the best attainable government, overlooking defects which they acknowledged, or trusting to the power of amendment; and (3) the mercantile and manufacturing classes, who regarded the commercial and revenue powers with great favor.[1]

206. Its Enemies.—The same writer divides the enemies of the Constitution into four classes: (1) those who had always opposed any enlargement of the federal system; (2) those whose consequence as politicians would be diminished by the establishment of a government able to attract to its service the highest classes of talent and character; (3) those who conscientiously believed its provisions and powers dangerous to the rights of the States and to the public liberty; and (4) those who were opposed to any government, State or National, that would have vigor or energy enough to protect the rights of property, to prevent schemes of plunder in the form of paper money, and to bring about the discharge of public and private debts.[2]

207. Arguments against the Constitution.—The old arguments against strengthening the government were all revamped and many new ones invented. But the main objections sprang from the old root, the antagonism involved in the dual system inherited from Colonial times. Most Americans now living have thoroughly adjusted the two loyalties and the two patriotisms, but in 1787 few had made that adjustment. Moreover, National feeling was then weak, State feeling strong. A collection of arguments soberly advanced in opposition to the Constitution could be made, that to-day would be most amusing.

208. No Bill of Rights.—Most of the State constitutions

---

[1] *History of the Constitution*, Vol. II., p. 495.
[2] Ibid., Vol. II., p. 496.

contained bills of rights. They consisted of propositions, mainly copied from the great English charters, asserting certain civil rights as belonging to the people. A motion for a committee to prepare such a bill to accompany the Constitution had been lost in the Convention. But when the Constitution came before the people for their ratification, the strongest attack was made at this point. The omission of such a bill was declared a fatal defect. The "little despised things called maxims" were declared to be the real safeguards of freedom. Mr. Hamilton replied to this criticism that bills of rights are by their nature contracts between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince; that they have no application to constitutions professedly founded upon the power of the people and executed by their representatives and servants; that, in a republic, the people surrender nothing; that the preamble of the Constitution is a much better recognition of popular rights than volumes of such aphorisms as commonly composed bills of rights.[1] It was also contended that the Constitution itself was a bill of rights in every rational sense, and to every useful purpose; also that the State bills of rights would still be in force, and that they would prove all-sufficient.

209. **State Conventions Called.**—The Convention recommended that the Constitution be sent for ratification to State conventions elected by the people, and not to the legislatures, because it was virtually a National system, and not a confederacy. Besides, conventions called for this special purpose would give a much better opportunity for calm and thorough discussion than the legislatures. The legislature of Rhode Island alone refused to comply, but submitted the Constitution to a popular vote, which could not affect the issue one way or the other.

210. **Conditional Ratification Proposed.**—The Conven-

[1] *The Federalist*, No. 84.

tion had scarcely adjourned when there began a most determined attempt to have the ratifications made conditional. More definitely, the plan was to have the State conventions propose amendments to be referred to a second General Convention, and then ratify the Constitution, provided these amendments were adopted, or at least considered. The supporters of the Constitution said the true plan was to ratify first, and leave amendments to the machinery of the Constitution itself.

211. The First Ratifications.—Delaware led the way, ratifying unanimously, December 7, 1787. Pennsylvania followed, December 12, with a vote of 46 to 23. Then came New Jersey, the 18th of the same month, with a unanimous vote. Georgia also was unanimous, January 2, 1788. Connecticut ratified the 9th of the same month by a vote of 128 to 40. The Massachusetts convention came next in order, and there the first determined battle was fought.

212. The Massachusetts Plan.—The Massachusetts convention was the sixth to act. Here the opposition were determined that the Constitution should not go into operation until it had been referred, with amendments, to a second General Convention for revision. At last this plan, which came to be called the "Massachusetts plan," was agreed upon: The convention should unconditionally ratify, but recommend to the favorable consideration of Congress certain amendments. Upon this plan a majority was obtained after a month's debate. The vote was taken February 6, 1788, and stood 187 to 168. The friends of the Constitution in several other States overcame the opposition by following the example set by Massachusetts. Without this mode of procedure, it is highly probable that the Constitution would have failed altogether.

213. The Remaining Ratifications.—Maryland voted 63 to 11, April 28; South Carolina, 149 to 73, May 23. The New Hampshire convention at its first session could not come to a decision, but at the second one, June 21, gave 57 votes for and 46 against the Constitution. This was the

ninth ratification and made the Constitution valid in respect to the nine States. Virginia gave her approval after a protracted and bitter resistance, June 25, 89 yeas to 79 nays. New York, at the end of a long struggle, and more determined than that in Virginia, July 26, gave the narrow majority of three in a total vote of 57. To secure even this small majority, the friends of the Constitution were compelled to agree to a recommendation that a second Federal Convention should be called, to act upon the amendments that had been or should be proposed. This was the last ratification until the new government had been some months in operation. The first North Carolina convention, by a decisive vote, refused to ratify until a second Federal Convention should be called; the second one, November 21, 1789, ratified by a majority of 11. The Rhode Island ratification was not given until May 29, 1790, and then only by a vote of 34 to 32. As rapidly as they were made, the ratifications were transmitted to Congress.

214. Washington and Ratification.—Washington expressed his views as to the scheme to defer ratification in the strongest terms. "Clear I am," said he, "if another Federal Convention is attempted, that the sentiments of the members will be more discordant or less accommodating than the last. In fine, they will agree on no general plan. General government is now suspended by a thread; I might go further and say it is at an end; and what will be the consequence of a fruitless attempt to amend the one which is offered before it is tried, or of the delay of the attempt, does not, in my opinion, need the gift of prophecy to predict. The Constitution or disunion is before us to choose from. If the first is our election, when the defects of it are experienced, a constitutional door is open for amendments, and may be adopted in a peaceable manner, without tumult or disorder." Moreover, the popular conviction that he was sure to be chosen to preside over the inauguration of the new government was a great factor. With him the interests of the people would be safe. Monroe wrote to Jefferson, "Be assured Washington's influence carried this government."

215. Patrick Henry.—The distinguished orator Patrick Henry had refused a seat in the Federal Convention, but accepted one in the Virginia convention called to ratify the Constitution; and his course there well illustrates the most determined opposition that

was made. "He could not endure," it has been said, "the thought of a government external to that of Virginia, and yet possessed of the power of direct taxation over the people of the State. He regarded with utter abhorrence the idea of laws binding the people of Virginia by the authority of the people of the United States; and thinking that he saw in the Constitution a purely national and consolidated government, and refusing to see the federal principle which its advocates declared was incorporated in its system of representation, he shut his eyes resolutely upon all the evils and defects of the Confederation, and denounced the new plan as a monstrous departure from the only safe construction of a Union. He belonged too, to that school of public men—some of whose principles in this respect it is vain to question—who considered a bill of rights essential in every republican government that is clothed with powers of direct legislation."[1]

216. Foreshadowings of Political Parties.—In the conflict attending the establishment of the Constitution, the beginnings of the future political parties appeared. They arose out of the absorbing question of the times—the expansion of the National Government. The names "national," pertaining to a nation, and "federal," pertaining to a *fœdus*, federation, or league, justly describe the two parties that divided the country in 1787. These parties survived that struggle, although there was some changing of sides and of names. The Nationalists now assumed the name Federalists, because they favored the ratification of the Federal Constitution, and the Federalists became Anti-federalists, because opposed to such ratification. A few years later believers in loose-construction were called Federalists, while believers in strict-construction called themselves Republicans and Democratic-Republicans. Change of name did not imply a necessary change of principle. Hamilton and Madison were Nationalists in 1787, because they favored strengthening the government; they were Federalists in 1788, because they favored ratifying the Federal Constitution; afterwards they separated, the first becoming a Federalist and the second a Democratic-Republican, because they did not agree as to the powers of the government under the Constitution. Again, Patrick Henry was a Federalist in 1787, an Anti-federalist in 1788, and a Federalist again after the government was put in operation.

217. Course of History Reviewed.—In the preceding history two things stand out with prominence. One is that it was the ratifications of the State conventions, speaking the voice of the people, which gave the Constitution all its binding force. Or, as Chief-

[1] Curtis, *History of the Constitution*, Vol. II., p. 554.

Justice Marshall said: "From these conventions the Constitution derives its whole authority." The other is that the adoption of the Constitution and the inauguration of the new government together composed a political revolution. The Articles of Confederation provided in express terms how the government established in 1775, and confirmed in 1781, should be changed, and these provisions were disregarded in every particular.[1] Thus the new order of things was a peaceful revolution enacted by the sovereign people.

NOTE.— Alexander Hamilton had been very influential in bringing about the Federal Convention of which he was also a member. Of all the members of that body, he believed in a strong government, but he cheerfully signed the Constitution on the ground that it was impossible to deliberate between anarchy on the one side and the chance of good government on the other. The Convention over, Hamilton threw himself into the ratification struggle, and without him ratification would have failed in New York, and possibly in other states. He conceived the idea of a series of essays to explain to the public what the Constitution really was, and called to his side Jay and Madison to aid in its execution. These essays are collectively known as *The Federalist*, of which he wrote much the larger number. They were widely published and read, and had great influence. *The Federalist* was projected for a temporary purpose, but it proved to be the best commentary on the Constitution ever written.

---

[1]See Cooley, *Principles of Constitutional Law*, p. 16.

CHAPTER XI.

THE CONSTITUTION GOES INTO OPERATION.

REFERENCES.

Bancroft, Vol. VI. ("The Formation of the American Constitution," V.); Hildreth, Vol. III.; Pitkin, Chap. XX.; McMaster, Vol. I., Chap. VI.; Hart, Chap. VII.; Fiske, *Critical Period of American History.*

Annals of Congress, Vol. I.; Benton, *Abridgment of the Debates of Congress,* Vol. I.; Lanman, *History of Congress, 1789 to 1793,* Chap. I.; *U. S. Statutes at Large.*

218. Second Resolution of the Convention.—The second resolution of the Federal Convention (p. 106) related to putting the Constitution into operation, and was in these words:

"That it is the opinion of this Convention that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a day on which Electors should be appointed by the States which shall have ratified the same, and a day on which the Electors should assemble to vote for the President, and the time and place for commencing proceedings under this Constitution. That after such publication, the Electors should be appointed and the Senators and Representatives elected. That the Electors should meet on the day fixed for the election of the President, and should transmit their votes certified, signed, sealed, and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled; that the Senators and Representatives should convene at the time and place assigned; that the Senators should appoint a president of the Senate for the sole purpose of receiving, opening, and counting the votes for President, and that, after he shall be chosen,

the Congress, together with the President, should, without delay, proceed to execute this Constitution."

219. **Action of Congress.**—On July 2, 1788, the ratification of New Hampshire was received, and the president called the attention of Congress to the fact that this was the ninth ratification. Whereupon it was ordered: "That the ratifications of the Constitution of the United States, transmitted to Congress, be referred to a committee to examine the same, and report an act to Congress for putting the said Constitution into operation, in pursuance of the resolutions of the late Federal Convention." On the 14th of the same month the committee reported, and September 13th, Congress adopted the following resolution:

"That the first Wednesday in January next be the day for appointing Electors in the several States, which, before the said day, shall have ratified the said Constitution; that the first Wednesday in February next be the day for the Electors to assemble in their respective States and vote for a President; and that the first Wednesday in March next be the time, and the present seat of Congress the place, for commencing the proceedings under the said Constitution."[1]

220. **Appointment of Presidential Electors.**—The new Constitution said each State should appoint the number of Electors to which it was entitled, in such manner as the legislature thereof might direct. Ten States proceeded on the day appointed, January 7, to discharge this duty. New York made no appointments, owing to a dispute between the two houses of the legislature as to the manner in which it should be done; while Rhode Island and North Carolina had not ratified the Constitution, and so had no part in the first presidential election.

221. **First Meeting of the New Congress.**—Even after the ratification of the Constitution by nine States, many

[1] It happened that the first Wednesday in March, 1789, was the 4th of that month, which day has since marked the beginning of the successive administrations and Congresses, and since 1804 has been a part of the Constitution itself. (Amendment XII.) Congress was sitting in New York when the above action was taken, and it was there that the new government was organized.

people, some of them its ardent friends, had doubts whether it would ever go into operation. They were far from sure that there was enough popular interest to secure the appointment or election of Electors, Representatives, and Senators. That their fears were not without reason, is shown by the circumstances attending the organization of Congress. Thirteen members of the House of Representatives, representing four States, reported for duty March 4; adjournments were had from day to day until April 1, when thirty members, or a quorum, being present, an organization was effected. Eight Senators from four States attended March 4. The Senate also adjourned from day to day until April 6, when, twelve members being present, a temporary organization was effected by the election of John Langdon, of New Hampshire, president, for the sole purpose of opening and counting the votes for President of the United States. The same day, the two houses of Congress met in the Senate chamber to witness the counting of the votes. It was found that Washington had been elected President and John Adams Vice President, and Mr. Langdon so announced.

222. **Washington Inaugurated.**—Messengers were at once sent to the President and Vice President elect, conveying official information of their election. On April 21 Mr. Adams appeared in the Senate chamber, took the chair, and made an address appropriate to the occasion. The 30th of the same month Washington took the oath of office prescribed by the Constitution, delivering an inaugural address, and entered upon the duties of his great office. Two branches of the government, the legislative and the executive, were now in motion; the third, the judiciary, had to await the enacting of a judiciary law and the appointment of judges.

PART II.

THE NATIONAL GOVERNMENT.

CHAPTER XII.

THE NATIONAL AND STATE GOVERNMENTS.

REFERENCES.

The principal authorities for the second part of this work are here given once for all. They are practically the same throughout, and to repeat them at the head of every chapter would be both wearisome and unnecessary. Furthermore, they are well-known works, and the student using the indexes with which they are liberally furnished, will have little difficulty in finding the appropriate passages. Occasional titles will, however, be given as heretofore, and still others in footnotes.

I. CONTEMPORARY AUTHORITIES.—Elliot's *Debates,* Vols. I.-V. The first of these volumes contains the Journal of the Federal Convention, and the fifth one Mr. Madison's diary of the debates. Vols. II.-IV., which report the debates of the State conventions, may also be consulted with advantage. Madison's Diary is also found in *The Madison Papers,* Vol. III. However, the great contemporary exposition of the Constitution is *The Federalist.*

II. TEXT-WRITERS ON CONSTITUTIONAL LAW.—Story, *Commentaries on the Constitution of the U. S.;* Kent, *Commentaries on American Law,* Part II.; Pomeroy, *Introduction to the Constitutional Law of the U. S.;* Hare, *American Constitutional Law;* Miller, *Lectures on the Constitution of the U. S.;* Von Holst, *The Constitution of the U. S. of America;* Cooley, *Constitutional Limitations,* and *Principles of Constitutional Law.* The first of the two works by Judge Cooley is practically a treatise on the constitutional

law of the States; the second one should be in the hands of every teacher of the Constitution.

III. THE UNITED STATES SUPREME COURT REPORTS.—These are found in more than 150 volumes, and are referred to in every case save the last series by the name of the Reporter: Dallas 4 vols., Cranch 9, Wheaton 12, Peters 16, Howard 24, Black 2, Wallace 23, U. S. 60 and more. Whenever a decision of the court is referred to in this work, the appropriate citation is made.

IV. HISTORY.—Von Holst, *Constitutional and Political History of the United States* (a series of 10 volumes covering the period 1750–1861); Hildreth, *History of the U. S.*, Vols. IV.–VI. (coming down only to 1820); Landon, *Constitutional History and Government of the U. S.;* Schouler, *History of the U. S.;* McMaster, *History of the People of the U. S.;* Pitkin, *Political and Civil History of the U. S.*, Chaps. XX.–XXV.; Bancroft's and Curtis's histories of the Constitution; volumes of *The American Statesmen Series.* The teacher will find Johnston's *United States,* VI.–XI., his *History of American Politics,* and his historical articles in Lalor's *Cyclopædia* very helpful. Bryce's *The American Commonwealth* is second in value to no work that has been written on the American Government.

V. MISCELLANEOUS.—*U. S. Statutes at Large; Congressional Debates, Annals of Congress,* and *Congressional Record;* Desty, *The Constitution of the U. S. with notes,* and *Manual of Practice in the Courts of the U. S. with notes on Decisions.*

How the American Government was made, has been described at sufficient length in Part I. of this work. This description has also made it plain that the United States are a federal state, or *Bundesstaat,* and that their government is a federal government. Light has also been thrown upon the National and State sides of the dual system and upon their relations to each other. It now becomes our duty formally to describe the two governments that together constitute the one American Government. Shall we begin with the Nation or shall we begin with the States? The answer to this question will not be doubtful when we have considered the two jurisdictions under a single aspect.

223. Priority of the States.—Federal states have commonly been formed by uniting plural states previously

existing, not by dividing unitary states. Such was the history of the American state. The colonies as political societies came before the United States as a political society. Their governments, dating from the origin of the English plantations, were some of them more than a century and a half old when the national government came into existence. These facts, which have sometimes confused the work of political theorists, are never to be forgotten. (See Chaps. I.-IV.)

224. First Division of Powers.—Previous to the Revolution, the totality of governmental powers was possessed by the colonies and the home government, sovereignty residing in the latter. The separation of the colonies from the mother country, which practically took place in 1775, involved the withdrawal of all such powers from, or their denial, to her. At the same time that this withdrawal or denial was made, the totality of powers was divided — by general agreement, however, rather than by formal convention — between the colonies, which now became States, and the Union. In other words, the General Congress of the States, acting in the name of the one people, assumed the exercise of certain powers that were at the time deemed essential for the common defense, and this assumption was ratified by the acquiescence of the States and by the American people. For some years this distribution rested upon a purely prescriptive basis, but in 1781 it was incorporated, with little change, in the Articles of Confederation. (See Chaps. IV.-VI.)

225. Second Division of Powers.—The first distribution proving unsatisfactory, a second one was made in 1787-89. This second distribution of powers was effected by the framing and ratification of the Constitution, which still stands, so far as a written constitution can be said to "stand," save as modified by the fifteen Amendments. These Amendments, it may be observed, sometimes extend the original grant of powers, as XIII., XIV., XV.; sometimes more closely limit or define that grant, as I.-XI., and sometimes

merely change the mode in which an old power is exercised, as XII.

226. Inherent and Delegated Powers.—The circumstances under which the Union originated necessarily involved one distinction between the Nation and the State that must not be overlooked. The powers exercised by the State government are never called grants or delegations of power, while those exercised by the Nation are so styled. The States are therefore said to possess original or inherent powers, the Nation granted or delegated powers. This distinction dates from the formation of the Union. The Articles of Confederation reserved to the States all rights and powers that were not "expressly delegated" to the United States. The powers of the States may also be called residuary powers.

227. The Constitution a Grant of Powers.—The Constitution, which made so many other changes, did not touch the fundamental distinction that has been explained. History shows that the Convention of 1787 intended to proceed on the theory of delegated powers; the Constitution assumes it throughout, while Amendments IX. and X. declare it in express words, as follows:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

228. Phraseology of National and State Constitutions. — To an extent the National and State constitutions are written in different political vocabularies. The first speaks the language of delegated powers; the second speaks the language of inherent powers. Such provisions as those quoted above are peculiar to the National instrument. Section 8, Article I., of the Constitution comprises an enumeration of the general powers of Congress; but no State constitution contains a similar enumeration. Still, it must not

be supposed that the powers of the National Government are all expressly delegated.

229. **Implied Powers.**—Expressed powers are delegated in terms; implied powers by inference and necessity. It would be absurd to speak of the "implied" powers of the State, for implication always goes with delegation. The first seventeen clauses of Section 8, referred to above, convey express grants of power, while the last clause, by authorizing Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," plainly recognizes implied powers. But such powers would still exist even if this clause were not in the Constitution, for they are essential to the existence of the government.

Chief-Justice Marshall argued in one of his greatest opinions: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended; but we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[1]

230. **Powers Delegated, Prohibited, Reserved.**—Viewing the totality of political powers from the standpoint of the Constitution, we see them falling into the following groups: (1) Powers that are delegated to the Union. (2) Powers that are prohibited to the Union. (3) Powers that are prohibited to the States. (4) Powers that are reserved to the States or to the people. This fourth group or residue of powers, their original possessors, the States or

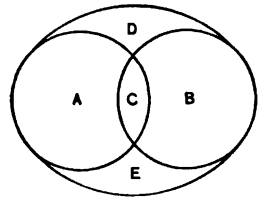
[1] McCulloch *v.* Maryland, 4 Wheaton 316.

the people, deal with as they see fit when they frame their constitutions.[1]

231. Concurrent Powers.—The division of powers accomplished in 1789 by the ratification of the Constitution left a large tract of political territory, so to speak, open to both the Union and the States. Accordingly, the two jurisdictions overlap. In fact, they always overlap unless the jurisdiction of the Nation excludes the jurisdiction of the State. For example, Mr. Justice Story says a reasonable interpretation of the Constitution necessarily leads to the conclusion that the powers granted to Congress are never exclusive of similar powers existing in the States, unless (1) "the Constitution has expressly, in terms, given an exclusive power to Congress;" or (2) "the exercise of a like power is prohibited to the States;" or (3) "there is a direct repugnancy or incompatibility in the exercise of it by the States."[2] Taxation well illustrates this concurrent jurisdiction. The Constitution gives Congress the most ample revenue powers, but it denies to the States only the laying of customs duties and duties on tonnage. Congress is empowered to levy internal taxes, and the States are not forbidden to do so. The whole field of internal taxation is open

---

[1] Mr. C. G. Tiedeman (*The Unwritten Constitution of the United States*, p. 138) thus illustrates the constitutional provisions in regard to powers.



"Outer circle represents totality of governmental powers.
"Circle A = powers delegated to the United States.
"Circle B = powers reserved to the states.
"Segment C = concurrent powers.
"Segment D = powers prohibited to both branches of government.
"Segment E = powers prohibited to the states, but neither prohibited nor delegated to the United States.

[2] Houston *v.* Moore, 2 Wheaton 259.

to the States, as well as to the Union. Generally, however, the States avoid taxes that would overlap those already imposed by Congress, lest property and industry be unduly burdened. In some cases the States have exercised powers until the Nation has seen fit to assume them, as in bankruptcy and authorizing paper money.

232. Constitutional Presumptions.—The student must approach the Union and the States in quite different ways. The presumption changes as we pass from the one to the other. Judge Cooley states the difference in these words:

"To ascertain whether any power assumed by the government of the United States is rightfully assumed, the Constitution is to be examined in order to see whether expressly or by fair implication the power has been granted."

"To ascertain whether a State rightly exercises a power, we have only to see whether, by the Constitution of the United States, it is conceded to the Union, or by that Constitution or that of the State prohibited to be exercised at all."[1]

233. Method of Study.—It is therefore clear that when the American people finally divided the powers of sovereignty, they made the States what may be called their residuary legatees. They delegated the most imposing powers — those that constitute sovereignty in the eye of international law — to the Union, and left the remainder, unless denied in terms or by implication, to their former holders. It is the Nation, therefore, that stands out with boldness upon the political background. It is the Nation that arrests the attention and appeals to the imagination. Accordingly, when a student has made himself familiar with so much of our system as exists and works under his own eyes — which belongs mainly to the State sphere — he should first take up the National Government, leaving the States for later study. The excepted or delegated powers naturally precede the residuary powers. A still further reason for observing this

[1] *Principles of Constitutional Law*, p. 31.

order is, that there are as many State constitutions as there are States, agreeing indeed in their most prominent features, but still differing in important details; while the study of the National Constitution, if intelligently carried on, will not fail to illuminate them all, thus making it possible to dispose of them together within a limited compass of space.

CHAPTER XIII.

THE NATURE OF THE CONSTITUTION.

References.

The literature on the nature of the Constitution is very voluminous. All the text writers mentioned in the references for the last chapter treat it directly and the historians indirectly. Clear statements of the different views that have been held, will be found in Professor Alexander Johnston's articles in Lalor's *Cyclopædia*, bearing the following titles: "Congress, Continental," "Declaration of Independence," "Nation," "State Sovereignty," "Kentucky Resolutions," "Convention, Hartford," "Judiciary," "Allegiance," "Nullification," "Secession," "Reconstruction." The extreme State Rights view is stated by Calhoun, *Works*, Vol. I., p. 111., Vol. II., pp. 197, 262, Vol. III., p. 140; by Jefferson Davis, *Rise and Fall of the Confederate Government;* and by A. H. Stephens, *The War Between the States.* Madison's view is stated by himself in *The Federalist*, No. 89, and in the *N. A. Review*, October, 1830. For Webster's view, see *Works*, Vol. III., pp. 270, 448; for Chief-Justice Marshall's, see McCulloch *v.* the State of Maryland, 4 Wheaton 316; for Chief-Justice Chase's, see Texas *v.* White, 7 Wallace 700.

The nature of the Constitution has been a source of contention almost from the day that our present government went into operation. The logic of history from the establishment of the English Plantations down to 1787, imposed upon the country a dual form of government, irrespective of the intrinsic merits of such a system. This was universally admitted at the time. "No political dreamer," says Chief-Justice Marshall, "was ever wild enough to think of breaking down the line which separated the States, and compounding the American people into one mass." The question before the Federal Convention was not the speculative one relating to the merits of federal government, but rather the practical one of adjustment,— committing certain

powers of government to the States and others to the Nation. What was the nature of the adjustment that was reached? This question will now be examined in its general features, leaving minor ones to be considered hereafter. First, we shall look at contemporary opinion.

234. View of the National Party.—The principal questions that arose in connection with the framing and ratification of the Constitution, and the answers that were returned to them, are set forth in Chapters VIII.-X. The general issue was whether a National system, or a federal state, should be formed, or the old State system, or Confederation, with modifications, should be continued. That issue was decided in all essential points in favor of the first plan. The plan finally adopted embraced a government of three departments, a bicameral legislature clothed with ample powers, and an efficient executive and judiciary — in a word, a government that at all points where the National will was involved, was wholly independent of the State governments, and was fully equipped to execute that will directly upon the people. One concession was made to the Carolinas and Georgia in relation to the slave trade, one to the agricultural States in regard to an export duty, and one to the small States of an equal suffrage in the Senate; but no one of the so-called compromises touched the heart of the great question at issue. While the men who favored a National system were obliged to concede some points that they would rather have retained, they still felt at the close of their labors that they had, in material features, secured what they desired. Men like Paterson and Dickinson, who had originally favored a State system, understood the grand result in the same way. This was also the understanding of the men who abandoned the Convention before it adjourned, and those who at last refused to sign the Constitution.

235. View of the State Party.—The men who opposed the Constitution were known as the State party. They opposed it on the express ground that a National system had been formed. The Constitution spoke in the name of the

people, the Articles of Confederation in the name of the States; and the State men, hoping to create prejudice thereby, caught at the change of style and strove to make the most of it. Patrick Henry demanded in the Viriginia convention, "Why the change from 'we, the States,' to 'we, the people'?" and he denounced the instrument as that of a consolidated National government. Some of those who opposed the Constitution on the ground that it provided for a national system, or federal state, a few years later united with others who had favored it, in the claim that it was only a confederation, and in forming a political party that was based on that idea. Had this been the common understanding in 1787 and 1788, those who favored the Constitution would have opposed, and those who opposed it would have favored, its ratification.

This common understanding is fully sustained when we come to examine the instrument itself.

236. The Preamble.—The first clause of the Constitution is commonly called the preamble, but also sometimes its enacting clause. A proper preamble gives reasons why a resolution or act is passed, and, since it does not resolve, enact, or ordain anything, is not a part of the act itself. An enacting clause, on the other hand, gives the act all its force and effect. If the following declaration were nothing but a preamble, it could be cut off without affecting the Constitution; but on the contrary it is an integral and necessary part of the instrument itself. It is in these words:

> We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

237. Elements of the Preamble.—The preamble consists of three elements:

1. The name of the nation, people, or sovereign power that acts or speaks: We, the people of the United States.
2. The ends or objects for which the sovereign power

acts or speaks: (1) In order to form a more perfect union; (2) to establish justice; (3) to insure domestic tranquillity; (4) to provide for the common defense; (5) to promote the general welfare; and (6) to secure the blessings of liberty to ourselves and our posterity.

3. The thing done: Do ordain and establish this Constitution for the United States of America.

238. Source of the Constitution.—This so-called preamble is decisive as to the sovereign power that ordained the Constitution, and so as to its source. In the two most solemn crises of their history, the American people, by their representatives, have spoken the same authoritative language. In 1776 they said, "We . . . do . . . solemnly publish and declare that these United Colonies are, and of right ought to be, free and independent States." In 1787 they said: "We . . . do ordain and establish this Constitution for the United States of America." The Declaration of Independence and the Constitution were National acts in the fullest sense of that term.

It is no valid objection to this view that Congress and the State legislatures were prominent. In ordaining their Constitution, or in performing other sovereign acts, a people will naturally employ such agents as are at hand. It was the States that immediately called the Continental Congress, and appointed the delegates that comprised it; but the men who signed the Declaration of Independence did so in the name and by the authority of the good people of the States. So the Congress of the Confederation, and the State legislatures, rendered important services in creating and establishing the Constitution; but the thirty-nine signers stood in the same relation to the Constitution that the fifty-five signers stood to the Declaration. Still more, the calling of the Convention by the State legislatures, and the framing of the Constitution by the Convention, were only preliminary steps to the grand and binding act of the adoption of the Constitution by the people in conventions. As Chief-Justice Marshall has said: "From these conventions the Constitu-

tion derives its whole authority. The government proceeds directly from the people; is ordained and established in the name of the people. . . . It required not the affirmance of, and could not be negotiated by, the State governments." Article V. provides that amendments to the Constitution may be made; Congress and the legislatures do the formal work in making them; but the amendments are, nevertheless, made by the people, the same as the original instrument.

The facts then are these: The nation, or the people, are sovereign; but they have committed some powers to one jurisdiction and some to another. Each of these jurisdictions is supreme in its own sphere. Or, as Chief-Justice Marshall states the case: "In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." [1]

239. Influence of Words and Theories.—The statesmen of 1787-89 made free use of such words and phrases as "National system," "State plan," "consolidated government," and "confederation." We must not suppose, however, that these men used these expressions in fixed and absolute senses. Such terms are somewhat elusive and variable even in scientific treatises on government, and much more so in practical political discussions. Statesmen are not always free from using language that they think, by its meaning and associations, will win them favor or cast odium upon their opponents. Hence we must not approach the discussions of the Constitutional epoch with heads full of abstract theories and dictionary definitions. To do so, is to read into those discussions the controversies of a later day. We must go at once to the facts—listen to the debates, and read the Constitution—if we would not be misled. As a matter of course, such terms as "National plan" and "State plan" always implied more or less difference of opinion, and often a wide difference of opinion; but because William Paterson favored the State plan it does not follow that he wished the Union to continue weak and helpless; and no more does it follow that such a stanch Nationalist as James Madison desired to emasculate the States.

Again, the words "sovereignty" and "sovereign states" are of frequent occurrence in the period 1775-1789. The evidence shows

[1] McCulloch *v.* Maryland, 4 Wheaton, 316.

conclusively that this language was loosely used. It is impossible to suppose that the men who put such language in the Articles of Confederation meant to declare that Rhode Island or Delaware was a sovereign in the sense that France or Great Britain was a sovereign. They did not mean thus to flatter the States, or to degrade the Union. There is good reason to think that when the wiser statesmen of that period used such language they were looking rather to the old relations of the States to England than to their new relations to the nations of the earth and to the American Union. No little mischief has resulted from the frequent habit of reading the history of the Revolution, and construing the Constitution, in the light of abstract definitions and speculative theories.

240. Constitutions a Growth.—Useful constitutions, even when they are put in a written form, are always in great part a growth. Wholly, or largely, the elements that compose them are the product of progressive history. But, more than this, constitutions continue to grow even after they are formed. They cannot be written in the unyielding language of the fixed sciences. Society changes, and constitutions must change with it, or they will be cast aside. Even amendments, if frequently made, will not maintain a positive adjustment between the two factors: Society, on the one hand, and the written fundamental law, on the other. The constitution that works is never just the same as the constitution that is printed in the statute book. This growth, which consists in the adaptation of old forms to new conditions, is affected, amendments apart, through the process of constitutional interpretation, whereby its provisions are applied to the facts of social life. Hence it was impossible to tell in 1787 just what the new government would be. No two of the men who had assisted in framing the Constitution would have agreed throughout in explaining it; while no man would have ventured to predict, in any detailed way, how Congress, the President, and the Courts would construe its provisions. The general character of the government was indeed determined, so long as the Constitution should remain in force and unchanged; still there was abundant room for the Nation, as its growth should take this or that direction, speaking through the organs which it had created, to give its terms very different practical interpretations on many subjects. For example, the phrase in the preamble, "to promote the general welfare," and the last of the general powers of Congress, "to make all laws which shall be necessary," etc., opened a wide door for practical constitutional development. All this a century of history has fully shown.[1]

[1] See Bryce, *The American Commonwealth*, Chaps. XXXI.-XXXV.

CHAPTER XIV.

THE SOURCES OF THE CONSTITUTION.

REFERENCES.

Campbell, *The Puritan in Holland, England, and America;* C. E. Stevens, *Sources of the Constitution of the U. S.;* Johnston, "A Century of the Constitution," in *New Princeton Review,* Sept., 1887; Sir H. S. Maine, *Popular Government,* Essay IV. ("The Constitution of the U. S."). The broadest features of the subject have been dealt with by Dr. Freeman, *Comparative Politics,* particularly Lect. II. ("Greek, Roman, and Teuton").

The sources of the National Constitution have only recently become the subject of historical discussion. They will be briefly treated in the present chapter.

241. Fiat Theory of the Constitution.—Chapters VI.-X. of this work show that, as one has said, "The Constitution was extorted from the grinding necessity of a reluctant people." When it came to ratification, the change of 3 votes out of 60 in New York, of 5 out of 168 in Virginia, and 10 out of 355 in Massachusetts, on the decisive ballots, would have sufficed to defeat that end. For reasons that are here immaterial, the spirit of opposition fully died out in three or four years, and a feeling of admiration quite as strong took its place. "The worship of the Constitution," and "the Constitution a national fetish," are among the strong phrases that Dr. Von Holst uses to express the feeling that the instrument has commonly inspired in the hearts of Americans. Often its formation has been described as a creative act, inspired by more than human vision. This view is something very like the one that Mr. Gladstone is understood to have expressed in his famous characterization. "As the British Constitution is the most

subtle organism which has proceeded from progressive history," he says, "so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

242. The Organic Theory.—The making of the American Government, as its history has been traced in Part I. of this work, suggests a very different theory. This history points, not only to a long course of political evolution that took place partly in Germany, partly in England, and partly in America, and that elaborated the materials or elements out of which the Constitution was formed, but it also reveals the real nature of the work that was done in Philadelphia in 1787. The Federal Convention did not invent new political ideas, or create new governmental institutions; what it did was to select, combine, and adjust old ideas and institutions in a manner that, in the opinion of a majority of its members, would constitute a working government for the American people. In respect to elements, therefore, the American Constitution as much proceeded from progressive history as the British Constitution; and it is only in respect to this work of selection, combination, and adaptation that it can be said that it was struck off at a given time by the brain and purpose of man. And this, it is not improbable, is what Mr. Gladstone really intended to say. Still, in this second particular, there is a marked difference between the two constitutions; the parts of the one slowly grew together like a living organism, while the parts of the other, in a measure, were put together at a given time like the parts of a building. No transaction like that at Philadelphia finds a place in British constitutional history.

243. Relations of the Two Constitutions.—In a large sense, the new Constitution that was *made* was a copy of the old one that had *grown*. The colonists had not revolted against the British constitution, but only against the way in which, as affected themselves, the king and Parliament made that constitution work. On the other hand, they were as deeply attached to that constitution as it is possible for men

to be attached to the institutions of their fathers. Not only is our Constitution "colored throughout by political ideas of British origin," as Sir H. S. Maine says, but it is in reality, as he also says, "a version of the British constitution" as it existed in the latter half of the eighteenth century.[1] Fortunately, this fact can be made to appear at the same time that some cardinal features of the American Government are explained.

244. Powers of Government.—Generally speaking, the powers of government are three in number: they are the power that enacts or makes, the power that enforces or executes, and the power that construes or interprets the law. Manifestly, good government is impossible when any one of these powers is wanting. The law must be declared, must be enforced, and must be adapted to the changing facts and circumstances that originate in human society. These powers are called the Legislative, the Executive, and the Judicial powers. While they are alike necessary, and in a sense coequal, experience shows, what philosophy also suggests, that the law-making power is the greatest of the three, and that in free countries it tends to encroach upon the other two.

245. Departments of Government.—Sometimes the three powers of government are all concentrated directly in the hands of one man or of one set of men. The result of such a state of things Mr. Madison has thus described: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny."[2] Hence as societies have advanced, causing improvements in government, there has also been a pronounced tendency to separate the three powers, intrusting them more or less completely to different men or agents. In no country had the distinction of the three powers been more clearly seen.

[1] *Popular Government*, pp. 207, 208.

[2] *The Federalist*, No. 47.

and in no government had they been more fully separated, than in the England and the English government of 1775-1789. Three departments of government, more or less separate and distinct, bearing the names of Parliament, Crown, and Courts of Law, antedated the settlements of Jamestown and Plymouth. The members of the Federal Convention were fully instructed in these important facts. Without looking farther for reasons, we see that it was perfectly natural that they should adopt the following as the first of their resolutions: "That a National government ought to be established consisting of a supreme Legislative, Executive, and Judiciary." Accordingly, such departments were duly constituted. In the eye of political science, the Congress, Presidency, and Judiciary of our Constitution answer to the Parliament, the Crown, and the Law Courts of England. These, however, are only the larger features that were borrowed.

246. Relations of the Three Departments.—These departments are commonly described as separate, independent, and coördinate. This is true in the sense that they are all created by the Constitution, and that no one of them, without an act of usurpation, can be destroyed by either or both of the others. But practically the three powers are not separate and independent. The Executive has a part in making laws; Congress declares war, which is an executive act; the Senate acts with the President in making treaties and appointing officers, and is also a court for trying impeachment cases; while many provisions of law are enforced by the Courts. Moreover, Congress constantly has to do with administration, particularly through the committees of the two houses.

247. Influence of the State Constitutions.—There was still another reason why the Convention created the three departments and organized the powers of government as it did. In Chapter II. it is shown that the colonies, sovereignty aside, were miniature Englands; or, in other words, that their institutions were produced through the trans-

plantation and development of English institutions, and not by formal creation. It was also shown in Chapter IV. that the State governments, reorganized save in two cases, were the old colonial governments somewhat changed and adapted to the new order of things. These governments, which had been fully tested in their essential features, were also before the statesmen of 1787, and materially influenced their discussions and conclusions. In the most direct and immediate sense, the State constitutions were in fact the models that were followed by the Convention at Philadelphia.

Prof. Alexander Johnston has worked out the resemblances with much care. In all the States the three powers were intrusted to three coördinate branches; with two exceptions, they had bicameral legislatures; in 7, the upper house was called the Senate, in 4, the lower house, the House of Representatives; in most of the States the two houses had different bases, Connecticut, for example, making the towns equal in one house while choosing the other from the whole people—which suggested the bases of the National House of Representatives and Senate. The President stood in the room of the familiar governor, who was called president in at least 4 of the States. As a rule the governors were commanders in chief of the State forces, had the pardoning power, and, before the war, exercised the power of veto. The Vice President was the lieutenant governor reproduced. The independent judiciary, and the whole judicial system in its large features, was immediately suggested by the States. These are a few of the many interesting analogies that this writer has traced out.[1]

NOTE.—The careful reader of Madison's reports of the debates in the Convention, and of *The Federalist*, sees how the speakers and writers are constantly resorting to State experience for analogies and arguments. Sir H. S. Maine observes that Hamilton, Jay, and Madison, in writing *The Federalist*, searched carefully for historical arguments with which to enforce the Constitution. (*Popular Government*, Essay IV.) They resorted to the ancient republics, to the Netherlands, to the Holy Roman Empire — sometimes for confirmation, and sometimes for the opposite; "but far the most important experience to which they appealed was that of their own country in a very recent date." "Nevertheless, there is one fund of political experience," says Maine, "upon which *The Federalist* seldom drew, and that is the political experience of Great Britain. The scantiness of the references [he finds but three] is at first sight

[1] "The First Century of the Constitution" in *New Princeton Review*, Sept., 1887.

inexplicable." After a page or more of discussion, the distinguished writer finds one of the two reasons for the omission. "The appeal to British experience would only have provoked prejudice and repulsion." The other reason is that the hardest problems that were solved at Philadelphia were of a kind that did not admit of much direct assistance from the British quarter. For example, the question, How shall the two houses be constituted? was more trying than the question whether there should be two, and what they should be called. On these secondary points, the appeal to state history was far more helpful than an appeal to any foreign source could possibly be.

CHAPTER XV.

THE CONSTITUTION IN OUTLINE.

Before the student enters upon an examination of the Constitution, clause by clause, he should form a comprehensive view of it as a whole. In such a case the proper course of procedure is analysis,— from the whole to the parts. If this be not done, the study is more than likely to be fragmentary and incomplete. Again at the end, when the examination of the parts is completed, the whole Constitution should be reviewed, and again be treated as a whole. To promote these ends, the following outline is presented.

248. Parts of the Constitution.—These are the preamble, the seven articles, and the fifteen amendments. Most of the articles, including the last three amendments, are subdivided into sections, and a majority of the sections are again subdivided into clauses. In the original, the clauses are not numbered, but editors have added the numbers for convenience of citation. The formal divisions, larger and smaller, are based on the corresponding divisions of the subject matter. Thus, Article I. relates to the legislature; section 8 of this article, to the general powers of Congress; clause two of the section, to the power to borrow money. The preamble need not be further considered.

249. Article I., 10 Sections.—Article I. relates to the legislative department of the government and connected subjects.

Section 1 vests the legislative power in a Senate and House of Representatives.

Section 2, five clauses, declares the composition of the House of Representatives, the length of the term, the qual-

ifications of electors and of Representatives, regulates the apportionment of members and of direct taxes, and provides for filling vacancies and for the election of the necessary officers. The House is given the sole power of impeachment.

Section 3, seven clauses, regulates the composition of the Senate, fixes the term of Senators, the classes into which they shall be divided, and their qualifications, declares the Vice President the president of the body and empowers it to choose other officers, including a president *pro tempore.* The Senate is made the court for trying impeachment cases, and the judgments that it may render in such cases are defined.

Section 4, two clauses, deals with the times, places, and manner of holding elections of Senators and Representatives, and provides for an annual session of Congress.

Section 5, four clauses, deals with the independent powers of the two houses of Congress; it makes them judges of the elections of their members, and regulates quorums, adjournments, rules, and records of proceeding.

Section 6, two clauses, provides that members of Congress shall receive a compensation from the national treasury, clothes them with special privileges, and declares their incapacity to hold certain offices.

Section 7, three clauses, commits to the House of Representatives the origination of revenue bills, and declares the procedure by which laws shall be enacted, including the definition of the President's veto.

Section 8, eighteen clauses, is a statement of the general powers of Congress.

Section 9, eight clauses, imposes limitations upon Congressional power: the slave trade, *habeas corpus,* bills of attainder and *ex post facto* laws, capitation taxes, export duties, the mode of drawing money from the treasury, and titles of nobility are all regulated.

Section 10, three clauses, imposes certain limitations upon the States. Here we have the formal denial to them of

some of the most imposing powers of sovereignty, as the power to enter into treaties with foreign states and with one another, to coin money, to keep troops in time of peace, and several others.

250. Article II., 4 Sections.— Article II. has for its subject matter the executive department of the government.

Section 1, seven clauses, vests the power in a President of the United States of America, defines his term of office, as also that of the Vice President, regulates the election of the two officers, and declares their qualifications. It also declares in what cases the Vice President shall succeed to the presidency, provides for the President a salary, which shall not be increased nor diminished during his term of office, and prescribes his inauguration oath.

Section 2, three clauses, defines the President's duties. He shall be commander in chief of the army and navy of the United States, may require the written opinion of the heads of the executive departments of the government, and shall possess the power of granting pardons and reprieves save in cases of impeachment. He shall, in conjunction with the Senate, make treaties, shall nominate and appoint certain classes of officers, and shall fill all vacancies in such offices that occur in the recess of the Senate.

Section 3 deals with the same subject. The President shall, from time to time, give Congress information of the State of the Union, and shall recommend to their attention such measures as he thinks necessary and expedient; he may convene them on extraordinary occasions, and adjourn them when they cannot agree on the time of adjournment; he shall receive ambassadors and other public ministers, shall take care that the laws be faithfully executed, and shall commission all officers of the United States.

Section 4 declares that the President and Vice President shall be removed from office if convicted on impeachment.

251. Article III., 3 Sections.—Article III. deals with the judicial department.

Section 1 vests such power in one Supreme Court, and

such inferior courts as Congress shall from time to time create. It makes the tenure of the judges during good behavior, and forbids Congress to diminish their compensation after they enter upon their office.

Section 2, three clauses, declares the classes of cases to which the judicial power shall extend, defines the jurisdiction, original and appellate, of the Supreme Court, and regulates the trial of all crimes, securing the right of trial by jury, and defining places of trial.

Section 3, two clauses, defines the crime of treason and the mode of its proof, and intrusts to Congress its punishment, subject to a single regulation in respect to corruption of blood and forfeiture of estate.

252. Article IV., 4 Sections.—Article IV. relates to various subjects.

Section 1 guarantees the faith and credit of the public acts of any State in all the other States.

Section 2, three clauses, guarantees the rights and privileges of citizens of one State in the other States, and declares that fugitives from justice, and fugitives from service or labor (slaves and apprentices), fleeing from one State into another, shall be given up.

Section 3, two clauses, provides for the admission of new States into the Union, and for the management of the national territory and other property.

Section 4 says the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion and, on application, against domestic violence.

253. Article V.—The fifth article deals exclusively with amendments to the Constitution, defining the manner in which they shall be proposed and in which they shall be ratified.

254. Article VI.—The sixth article (1) declares the inviolability of the debts and engagements of the United States entered into before the Constitution was adopted; (2) declares the supremacy of the Constitution, laws, and

treaties of the United States over all citizens and States; and (3) requires that Senators and Representatives, members of State legislatures, and all executive and judicial officers of the United States, and of the States, shall be bound by oath or affirmation to support the Constitution; but no religious test shall be made a qualification for any national office or trust.

255. **Article VII.**—The subject of Article VII. is the ratification of the Constitution.

256. **Amendments I.-X.**—The first ten amendments were proposed by Congress September 25, 1789, and, having received the requisite ratifications, were proclaimed to be in force, December 15, 1791. Together they constitute a bill of rights. They are intended to protect the citizen against undue interference by the national authority. Thus, they guarantee freedom of worship, of speech, of the press, the right of petition, the right to bear arms, immunity of the citizen against the army, the right to be secure in person, home, papers, and effects against unreasonable searches by public officers, and other personal and civil rights. Criminal trials are regulated, jury trial in civil cases guaranteed, excessive bail forbidden, and the doctrine of delegated authority, as respects the Constitution, affirmed.

257. **Amendment XI.**—The eleventh amendment, proposed March 5, 1794, and declared in force January 8, 1798, worked a considerable limitation of the jurisdiction of the national courts. Compare the amendment with Article III., Sec. 2.

258. **Amendment XII.**—The twelfth amendment was proposed December 12, 1803, and declared in force September 25, 1804. It materially changes the mode of electing the President and Vice President after the electoral colleges have been appointed by the States.

259. **Amendment XIII., 2 Sections.**—The thirteenth amendment abolished slavery in the United States. It was proposed January 31, 1865, and declared in force December 18 of the same year.

260. Amendment XIV., 5 Sections.—The fourteenth amendment, which was proposed June 16, 1866, and which took effect July 28, 1868, relates to the reconstruction of the Union following the Civil War. It defines citizenship, guarantees the privileges and immunities of citizens against State interference, provides a mode of apportioning Representatives in certain cases (which never took effect), declares certain persons who have participated in rebellion against the United States ineligible to Congress, to the electoral colleges, and to any office, State or National, until their disabilities shall have been removed by Congress, affirms the validity of the public debt, prohibits the United States or any State to pay debts contracted in aid of insurrection or rebellion against the Union, and to pay for any slaves lost or emancipated.

261. Amendment XV., 2 Sections.—The fifteenth amendment had the practical effect to confer the right of suffrage upon all citizens of the United States, so far as previously existing limitations growing out of race, color, or previous condition of servitude were concerned.

262. Objects of Review.—A careful reading of the Constitution, accompanied by such a grouping of provisions as the foregoing, in addition to preparing the student for close study of the instrument itself, will subserve two or three other purposes. It will show how admirably the various provisions that the Federal Convention had elaborated and agreed to, were worded and grouped by the Committee of Revision. Furthermore, it will admirably illustrate the nature of a constitution as opposed to an ordinary law. It will give force to the words of Chief-Justice Marshall:

"A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked,

its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." [1]

NOTE.—"History knows few instruments which in so few words lay down equally momentous rules on a vast range of matters of the highest importance and complexity. The Convention of 1787 were well advised in making their draft short, because it was essential that the people should comprehend it, because fresh differences of view would have emerged the further they had gone into details, and because the more one specifies the more one has to specify and to attempt the impossible task of providing beforehand for all contingencies. These sages were therefore content to lay down a few general rules and principles, leaving some details to be filled in by congressional legislation, and foreseeing that for others it would be necessary to trust to interpretation."—Bryce, Vol. I., p. 372 (1894).

---

[1] McCulloch *v.* The State of Maryland, 4 Wheaton 366

CHAPTER XVI.

VESTING THE LEGISLATIVE POWER.

ARTICLE I.

Section 1.—All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

263. Congress Bicameral.—As a rule, the legislatures of English-speaking countries have consisted of two houses. The House of Commons, as a distinct house of Parliament, dates from 1265. With few exceptions, the State legislatures in 1787 consisted of two houses. In some countries, and notably in France, one house, or the unicameral system, was formerly preferred. The great argument for two houses is, that one will check and balance the other. This plan tends to secure a more thorough consideration of subjects coming before the legislature, and so to prevent hasty and ill-considered legislation.[1]

264. Names of the Legislature and the Houses.—Naturally, the Federal Convention gave to the new legislature the name that the old one had borne, and to the two houses names by which corresponding State bodies were known. Congress, Senate, and House of Representatives

[1] This is well illustrated by an anecdote. Soon after his return from France, in 1789, Mr. Jefferson, who was much influenced by French ideas, dined with Washington. He severely attacked the two-house plan as obstructive and mischievous. Washington replied that he adhered to the experience of England and America. "You yourself," he said, "have proved the excellence of two houses this very moment." "I," said Jefferson, "how is that, general?" "You have," replied Washington, "turned your hot tea from the cup into the saucer, to get it cool. It is the same thing we desire of the two houses." —*Life and Letters of Francis Lieber*, p. 417. And yet there was strong objection made to introducing this system into the United States government, as has been shown in Part I.

were familiar names. It is both common and convenient to call the houses the upper and lower houses, though this language is not found in the Constitution or laws.

265. True Theory of Representation.—The true theory of representation cannot be better stated than in Judge Cooley's words:

"Representatives are chosen in States and districts; but when chosen they are legislators for the whole country, and are bound in all they do to regard the interest of the whole. Their own immediate constituents have no more right than the rest of the Nation to address them through the press, to appeal to them by petition, or to have their local interests considered by them in legislation. They bring with them their knowledge of local wants, sentiments, and opinions, and may enlighten Congress respecting these, and thereby aid all the members to act wisely in matters which affect the whole country; but the moral obligation to consider the interest of one part of the country as much as that of another, and to legislate with a view to the best interests of all, is obligatory upon every member, and no one can be relieved from this obligation by instructions from any source. Moreover, the special fitness to legislate for all, which is acquired by the association, mutual information, and comparison of views of a legislative body, cannot be had by the constituency, and the advantages would be lost to legislation if the right of instruction were recognized."[1]

266. The Right of Instruction.—The traditional theory of the House of Commons is that every member, although elected by a particular constituency, serves for the whole realm and not merely for the people that elected him. Blackstone says: "Therefore he is not bound like a deputy of the United Provinces to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or right to do so." Although a determined effort was made to establish the opposite one in the United States, the same theory has been established here as respects both the Senate and the House of Representatives.

[1] *The Principles of Constitutional Law*, pp. 41, 42.

In 1789 an unsuccessful attempt was made in the House of Representatives to insert in one of the proposed amendments to the Constitution a clause reserving to the people the right of instruction. Some advocates have affirmed the duty of a representative to obey such instructions when properly given, or to resign his office. Little is now heard of this right; but formerly it was common for State legislatures, and even for popular conventions, to instruct Senators and Representatives. Hugh L. White, Senator from Tennessee, maintained the doctrine of instruction in its extreme form; and when, in 1839, he could not conscientiously obey certain instructions that he had received from the legislature of his State, he resigned. In recent years legislatures have sometimes requested that a particular course be pursued by Senators and Representatives. The doctrine was defended on the ground that it is democratic. It is plainly impracticable, since there are no certain means of ascertaining what the people want without resorting to an election. Some of the States have incorporated the right of instruction into their constitutions, but no State has gone so far as to require the Representative to obey.[1]

---

[1] Switzerland has carried the democratic principle, or the direct participation of the people in government, farther than any other country. Not only do the voters, under certain condition, pass upon bills that the federal and cantonal legislatures have first approved, but they even initiate measures. See discussions of the Referendum and the Initiative in the following: Vincent, *State and Federal Government in Switzerland;* Adams and Cunningham, *The Swiss Confederation.* See also *The Atlantic Monthly*, April, 1894, "The Referendum in Switzerland and in America," and Lalor's *Cyclopædia*, article "Instructions."

CHAPTER XVII.

COMPOSITION AND ORGANIZATION OF THE HOUSE OF REPRESENTATIVES.

ARTICLE I.

Section 2, Clause 1.—The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

267. Representative's Term.—Some members of the Convention wished to limit the Representative's term to one year, and some wished to extend it to three years. The first argued that a short term would keep the Representative mindful of his dependence upon the people; the second, that a long term would tend to give the government permanence and stability. Two years was finally agreed upon as reasonably combining both ends.[1]

268. Representatives Elected by the People.—Except in Connecticut and Rhode Island, where they were elected by the people, the delegates to the Old Congress were appointed by the State legislatures. But it was an essential part of the new plan that the House of Representatives should be chosen by the people of the States. Hence it is called the popular branch of Congress. The legally qualified electors of State representatives are declared legally qualified electors of National Representatives. But as no State has more than one rule of suffrage, the man who may vote

[1] This clause also determines the length of a Congress. It is the same as the Representative's term. The first Congress legally began March 4, 1789; the Fifty-seventh Congress, March 4, 1901.

for State representatives may also vote for governor, etc. As each State makes its own rules, subject to a single limitation, a man may vote for a Representative in one State who cannot on moving to another. The single limitation referred to is found in section 1, Article XV., of Amendments: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." By giving the electors of National Representatives the same qualifications as electors of State representatives, the Constitution provides indirectly that State representatives shall be elected by the people.

Section 2, Clause 2.—No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

269. Original Qualifications of Representatives.—Beyond providing that no man should sit more than three years in six, the Articles of Confederation did not fix the qualifications of members of Congress. All other qualifications were left to the State. But the Constitution fixes the three qualifications of age, citizenship, and inhabitancy. The ages fixed in this clause and in clause 3 of section 3, and the periods of citizenship in the case of foreign-born citizens, are none too great to qualify men to sit in the two houses of Congress. Obviously, too, a legislature should consist wholly of citizens of the nation or state. In a great country like the United States, it is important that members of Congress shall be inhabitants of the States that elect them. As a rule, residents of New England could not intelligently represent the people of California. It is not necessary for a Representative to live in the district that he represents, but such is the almost unvarying custom.[1]

[1] In Great Britain it is common for members of the House of Commons not to live within the constituencies that elect them. A resident of London or Edinburgh, for instance, may represent any constituency in England, Scotland, or Wales. Mr. Gladstone, who resided in Wales, for many years sat for Midlothian, in Scotland. This rule there works well: It brings many able men into

Again, inhabitancy and residence are different things. "An inhabitant is a *bona fide* member of the State, subject to all the requisites of law, and entitled to all privileges and advantages under the law; actual residence is not essential, as if a person be a minister resident at a foreign port."[1]

The question has been asked whether a State may add to these qualifications of the Representative. The better opinion is that it cannot. The phrase "a citizen of the United States" asserts, what has often been denied, that these States are one country, a nation, and not a mere confederacy.

Section 2, Clause 3.—Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

270. Apportionment in the Federal Convention.—No other clause of the Constitution gave the Convention so much trouble as this one. The principal points of controversy, more fully stated in Chapter VIII., may be again enumerated: (1) The Small-State party contended for an equal representation; the Large-State party for a proportional representation. Population was finally decided upon. (2) The rule for determining the numbers was disputed no

---

Parliament who would otherwise be shut out. A man twenty-one years of age, if otherwise qualified, can sit in Parliament. Such, too, is the rule in one or both houses of most of our state legislatures.

[1] Desty, *The Constitution of the U. S.*, p. 45.

less warmly. It was unanimously agreed that all free persons should be counted; nor was there serious objection to counting persons bound to service and all Indians except those not taxed. But what should be done with the slaves? It was finally agreed to call them persons, and to count five of them as three in determining the respective numbers of the States. (3) There were also many opinions as to supplying the treasury, but it was agreed, at last, that the apportionment of direct taxes should be brought under the same rule as the apportionment of Representatives.

271. **Ratios and Apportionments.**—The Federal Convention at first agreed to put the minimum ratio of representation at 40,000, but reduced it to 30,000 at the very close of the session on a special plea made by Washington. This plea was that the reduction would enlarge the representation, and so tend to relieve the fears of those people who thought the new government would be a tyranny. No maximum was or could be fixed; the ratios must be determined from time to time with reference to population and the convenient size of the House.[1]

272. **Each State to Have One.**—The Constitution wisely stipulates that each State shall have at least one Representative. In 1873 Delaware, Nebraska, Nevada, and Oregon might have been unrepresented in the House had it not been for this stipulation, and at the present time several States fall below the ratio. The Representatives of States coming into the Union after the apportionment is made, are always additional to the number named in the law. Thus, the law of 1882 fixed the size of the House at 325;

[1] The first amendment proposed in 1790, which failed to receive the requisite number of ratifications, was in these words:

"After the first enumeration required by the first article of the Constitution, there shall be one Representative for every 30,000, until the number shall amount to 100, after which the proportion shall be so regulated by Congress that there shall be not less than 100 Representatives, nor less than one Representative for every 40,000 persons, until the number of Representatives shall amount to 200, after which the proportion shall be so regulated by Congress that there shall not be less than 200 Representatives, nor more than one Representative for every 50,000 persons."

the admission of six new States added seven to that number.

Congress, by law, authorizes every organized Territory to send a Delegate to the House of Representatives, who is allowed to speak but not to vote. At one time the District of Columbia was similarly represented.

273. Representation and Suffrage.—This clause relates to representation and not to voting. The Constitution determines the rule of apportionment; the States, subject to the Fifteenth Amendment, determine their own rules of suffrage. The representative population now includes every man, woman, and child, save Indians not taxed, in the States; whereas in only four States are women permitted to vote for Representatives. An average congressional district now contains about 200,000 people, but not more than a fifth of them are voters. Under the three-fifths rule, a Southern slaveholder with 1,000 slaves would count 601 in determining the basis of representation; he himself was the only voter.

Section 2, Clause 4.—When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

274. Vacancies.—Vacancies arise from death, resignation, expulsion, and accepting an incompatible office. An executive writ of election is a public proclamation by the governor of the State where the vacancy exists, announcing the vacancy, and naming the day on which the people of the district will choose a Representative to serve the remainder of the term.

Section 2, Clause 5.—The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

275. The Speaker, etc.—The "other officers" of the House are the Clerk, Sergeant-at-arms, Doorkeeper, Postmaster, and Chaplain. The Speaker is always a member of the House; the other officers are not members, although it is the custom to elect an ex-member clerk. The clerk holds his office until the Speaker of the succeeding House

is elected, and presides on that occasion. Commonly this election is easily effected, but the Thirty-fourth Congress spent two months and voted 133 times before it secured a Speaker, and the contest at the opening of the Thirty-sixth Congress was still more protracted. The Speaker has a right to vote on all questions, and is required to do so when his vote will decide the pending question, or when the vote is by ballot.[1]

276. Amendment XIV.—Section 3 of the Fourteenth Amendment introduced into the Constitution a new qualification for Senators and Representatives, and all officers, civil and military, viz.:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

By an act approved May 22, 1872, the disabilities imposed by this section were removed from all persons whatsoever, except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, former officers in the military and naval service of the United States, heads of departments, and foreign ministers of the United States. Still other persons have been relieved by special acts, and no one now rests under these disabilities for acts prior to 1898.

277. Origin of the Three-Fifths Rule.—By the year 1783, the plan for supplying the national treasury provided by the Articles of Confederation had thoroughly broken down. To meet this emergency, Congress recommended that the treasury should be supplied by the several States, "in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to service for a term of years, and three-fifths of all other persons not comprehended in the foregoing

[1] The title Speaker comes from England, where it is given to the presiding officers of both Houses of Parliament. The Lord Chancellor is Speaker of the House of Lords, *ex officio*. The Speaker of the House of Commons is chosen by the House, subject to the formal permission and approval of the crown. The title had been in use in the States from the very beginning.

description, except Indians not paying taxes in each State." This amendment was not ratified by the States, but it furnished the Convention of 1787 a means of escape from one of its serious embarrassments.

278. Effects of the Rule.—The three-fifths rule formally increased the representative power and the direct taxes of the Southern States, and diminished those of the Northern. But the rule did not work as was expected. Only five times have direct taxes been imposed by Congress, and then for short periods; while the South received, down to the Civil War, a large increase of Representatives, ranging at different times from fifteen to thirty members.

279. Amendments XIII., XIV.—The conditions of representation were materially changed by the abolition of slavery. There were now no "other persons" to whom the three-fifths rule could be applied. Amendment XIV. formally modified the old rule, but the modification is inoperative owing to the effect of Amendment XV. Still, this amendment states the original rule as it has practically worked since 1873: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Direct taxes are not mentioned in the amendment, but the same rule would apply to them.

280. The Census.—Representatives could not be apportioned according to population unless the population were enumerated; the population of the States would not remain stationary or increase in equal ratios; besides, the admission of new States to the Union must be provided for. To meet these requirements, the Constitution provided that an actual enumeration should be made within three years after the first meeting of Congress, and within every subsequent term of ten years, as Congress should direct. In a succeeding clause this enumeration is also called the census.

The census of the United States has been taken every ten years, beginning in 1790. Previous to 1790 the people of the States had never been carefully counted. Probably the Convention did not intend the census to be more than an enumeration of the people; but, beginning with 1810, the government used it more and more as an instrument for collecting and publishing other kinds of statistics also. The first census cost only $44,377; while that of 1890 cost more than $10,000,000, and filled about thirty octavo volumes. More recently, however, the decennial census has been confined to smaller compass. There are now established in the Department of Commerce and Labor both a Bureau of Statistics and a permanent Census Office; and much of the information that has been included in the decennial census reports is now published in other ways.

281. Indians not Taxed.—The Supreme Court has not defined the expression "Indians not taxed." The Census Office holds that it applies to Indians maintaining tribal relations and living upon government reservations. The broken bands and the scattered remnants of tribes still found in many States, though generally in a condition of pauperism, are included in the enumeration of the people. They are regarded as having entered the body of citizens and become subject to taxation, although they may be exempted by local legislation or by the accident of poverty.[1]

---

[1] The Census Office recognizes three kinds of population.

1. The true population embraces the total population of all the States and Territories, without regard to race, color, age, or sex.

2. The constitutional population embraces all the population that must be enumerated in order that the apportionment of Representatives and taxes may be duly made. Excluding Indians not taxed, it is the same, within the States, as the true population. The territories are not included in the constitutional population.

3. The representative population is the total numbers in the States, according to which Representatives and taxes are apportioned among them. Practically, it is now the same as the constitutional population; but when the three-fifths rule was in force, it was materially smaller. The constitutional population embraced all the slaves; the representative population only three fifths of them. The distinction is now purely historical.— *Compendium of the U. S. Census, 1870*, p. 19.

CHAPTER XVIII.

APPORTIONMENT OF REPRESENTATIVES UNDER THE CONSTITUTION.[1]

Several of the different Congresses that have dealt with this subject, have found it only less difficult than the Federal Convention found the framing of the original rules. An historical *résumé* will be given.

282. Meaning of the Rule.—Simple as the rule seems at first view, the first Congress that was called upon to apply it practically was divided in opinion as to its meaning. The fundamental question was, whether the Nation should be dealt with as a whole, or as made up of the several States. Should the aggregate representative population of the Union be divided by the ratio to ascertain the size of the House? Or should the State populations severally be so divided and the quotients then be added? The first method would give the larger House, since there would be but a single unrepresented fraction, while the second method would give as many fractions as there were States. This is the question of representing fractions. Different methods have been followed at different times.

283. The Method of 1793-1843.—The Federalists in the Second Congress, which was the first one to deal with the subject, contended for the first plan; the Anti-federalists, for the second plan. After a heated contest, Congress passed a bill based on the National principle. President

[1] See the article "Apportionment," in Lalor's *Cyclopædia*. Also the following reports: House of Representatives, 51st Congress, second session, No. 3280; Senate, same Congress, same session, No. 962, Part II.; *Official Congressional Directory*, W. H. Michael, 1891; *Official Congressional Directory*, A. J. Halford, 1904.

Washington, after submitting to his Cabinet the question whether he should sign the bill, and receiving from Hamilton and Knox an affirmative answer, and from Jefferson and Randolph a negative answer, vetoed it. A new bill framed on the State principle was then passed and approved. It provided that the House should be composed of members elected agreeably to a ratio of one member for every 33,000 persons in each State, computed according to the rule furnished by the Constitution. No account was taken of fractions. The apportionments made under the first five censuses all conformed to this rule, but with a change of ratios.

284. Attempt to Change the Rule in 1832.—As the ratios became larger, and the States more numerous and more populous, the unrepresented fractions became larger and more numerous. It became apparent that the method of 1793 was unjust and unrepublican. Two millions of people in one State had much more representative power than the same number in a half dozen States. Mr. Webster[1] pointed out in 1832 that, under the ratio of 47,700, then proposed for the ensuing apportionment, New York would have 40 Representatives, while the New England States, with a population 35,000 greater, would have but 38; that seven States named, having together 123 members, had aggregate fractions of but 53,000, while Vermont and New Jersey alone, with but 11 members, had a joint fraction of 75,000; and that Pennsylvania would have as many members as Vermont, New Hampshire, Massachusetts, and New Jersey, while her population was 130,000 less than theirs. The Senate, following Mr. Webster's lead, at first voted to reverse the decision of 1793, but afterwards concurred with the House in continuing the old rule.

285. The Method of 1843.—The rule adopted in 1793 was reversed in the sixth apportionment. The law of 1843 established a representative ratio of 70,680; gave every State as many Representatives as the number of times its popu-

[1] See his *Works*, Vol. III., p. 369.

lation contained this ratio, and then gave an additional Representative to every State having a fraction greater than half the said ratio. Since this act, fractions have always been represented, and the tendency has been to increasing complexity of method.

286. The Method of 1853-1863.—A ratio that yielded small fractions in some States would sometimes yield large fractions in others. The result was decennial contests over ratios, States favoring the ratio that would give them the largest representation. To cut off such controversies, it was provided in the Census Act of 1850 that the House of Representatives should consist of 233 members; that the Secretary of the Interior should divide the representative population of the whole country by 233 to obtain a ratio; that he should then divide the population of every State by this ratio; that he should assign to every State as many Representatives as the number of times its representative population contained this ratio; and finally, that he should assign an additional Representative to each of the States having the largest fractions, until a total of 233 members was reached. The Secretary of the Interior accordingly made two apportionments,—after the censuses of 1850 and 1860; but by an act of 1852 Congress gave an additional member to California, and by an act of 1862 it gave eight additional members to as many States.

287. The Method of 1873-1903.—In the apportionments based on the ninth, tenth, eleventh, and twelfth censuses, the principle of the Act of 1850 was adhered to, with minor variations; but in every case Congress fixed the number of members and made the apportionment after the census had been taken.

In 1870 the populations of Delaware, Nebraska, Nevada, and Oregon each fell below the final ratio agreed upon. Congress first fixed the number of Representatives at 283. Next it subtracted the population of these four States from the total population of the States (not including Territories), and divided the remainder by 279, the number of Representatives fixed on less the four to which the four States were entitled under the Constitution, which gave a ratio of 135,239. To each State the law then assigned as many Representatives as the number of times its representative population contained this ratio, and enough more were assigned for the largest fractions to make the total 283. By a subsequent act, however, an additional Representative was given to each of nine States named in the act, making 292 in all. This result was arrived at by making new calculations based on the number 290, and finally assigning two additional Representatives for large unrepresented fractions.

The act of 1882 was based on calculations made in strict accordance with the principle of the Act of 1850.

In 1890 the representative population of the States was 61,908,906. This number was divided by the numbers 332, 333, etc., to 375 successively, and then the population of each State by the resulting quotients. The number 356 produced the ratio 173,901; and this ratio, applied to the States one by one, gave no State a less number of Representatives than it had under the previous apportionment, provided the States having the major fractions were allowed each an additional Representative. The quotients aggregated 339, and 17, the difference between this number and 356, just equalled the number of major fractions. The House was therefore made to consist of 356 members, the number assigned to any State being equal to the number of times its population contained 173,901, plus one if it had a major fraction. No State had a moiety of the ratio left unrepresented. The largest unrepresented fraction was that of New York, 85,951, while a moiety was 86,952. But this measure could not probably have been carried, had not a number been found (356) that neither reduced the representation of any State, nor left, after the majority fractions were taken care of, a single unrepresented moiety.

The method followed in making the apportionment based on the census of 1900 was similar to that in the one preceding, and also to that of the second apportionment following the census of 1870. It was found that the number 386 was the lowest which would not reduce the representation of any State.

288. Numbers of the House and Ratios of Representation.—The following table shows, for each period, the size of the House and the ratio of representation. The number of the House was increased, however, whenever a new State was admitted:

Period.	Size of House.	Ratio.
1789–1793	65	
1793–1803	105	33,000
1803–1813	141	33,000
1813–1823	181	35,000
1823–1833	213	40,000
1833–1843	240	47,700
1843–1853	223	70,680
1853–1863	234	93,423
1863–1873	241	127,381
1873–1883	292	131,425
1883–1893	325	151,911
1893–1903	356	173,901
1903–	386	194,182

Table Showing the Several Apportionments of Representatives to the States.

	1787	1790	1800	1810	1820	1830	1840	1850	1860	1870	1880	1890	1900
Alabama	...	...	...	...	3	5	7	7	6	8	8	9	9
Arkansas	...	...	...	...	...	...	1	2	3	4	5	6	7
California	...	...	...	...	...	...	...	2	3	4	6	7	8
Colorado	...	...	...	...	...	...	...	...	...	...	1	2	3
Connecticut	5	7	7	7	6	6	4	4	4	4	4	4	5
Delaware	1	1	1	2	1	1	1	1	1	1	1	1	1
Florida	...	...	...	...	...	...	...	1	1	2	2	2	3
Georgia	3	2	4	6	7	9	8	8	7	9	10	11	11
Idaho	...	...	...	...	...	...	...	...	...	...	...	1	1
Illinois	...	...	...	...	1	3	7	9	14	19	20	22	25
Indiana	...	...	...	...	3	7	10	11	11	13	13	13	13
Iowa	...	...	...	...	...	...	...	2	6	9	11	11	11
Kansas	...	...	...	...	...	...	...	...	1	3	7	8	8
Kentucky	...	2	6	10	12	13	10	10	9	10	11	11	11
Louisiana	...	...	...	...	3	3	4	4	5	6	6	6	7
Maine	...	...	...	...	7	8	7	6	5	5	4	4	4
Maryland	6	8	9	9	9	8	6	6	5	6	6	6	6
Massachusetts	8	14	17	20	13	12	10	11	10	11	12	13	14
Michigan	...	...	...	...	...	...	3	4	6	9	11	12	12
Minnesota	...	...	...	...	...	...	...	...	2	3	5	7	9
Mississippi	...	...	...	...	1	2	4	5	5	6	7	7	8
Missouri	...	...	...	...	1	2	5	7	9	13	14	15	16
Montana	...	...	...	...	...	...	...	...	...	...	...	1	1
Nebraska	...	...	...	...	...	...	...	...	...	1	3	6	6
Nevada	...	...	...	...	...	...	...	...	...	1	1	1	1
New Hampshire	3	4	5	6	6	5	4	3	3	3	2	2	2
New Jersey	4	5	6	6	6	6	5	5	5	7	7	8	10
New York	6	10	17	27	34	40	34	33	31	33	34	34	37
North Carolina	5	10	12	13	13	13	9	8	7	8	9	9	10
North Dakota	...	...	...	...	...	...	...	...	...	...	...	1	2
Ohio	...	...	...	6	14	19	21	21	19	20	21	21	21
Oregon	...	...	...	...	...	...	...	...	1	1	1	2	2
Pennsylvania	8	13	18	23	26	28	24	25	24	27	28	30	32
Rhode Island	1	2	2	2	2	2	2	2	2	2	2	2	2
South Carolina	5	6	8	9	9	9	7	6	4	5	7	7	7
South Dakota	...	...	...	...	...	...	...	...	...	...	...	2	2
Tennessee	...	...	3	6	9	13	11	10	8	10	10	10	10
Texas	...	...	...	...	...	...	...	2	4	6	11	13	16
Utah	...	...	...	...	...	...	...	...	...	...	...	...	1
Vermont	...	2	4	6	5	5	4	3	3	3	2	2	2
Virginia	10	19	22	23	22	21	15	13	11	9	10	10	10
Washington	...	...	...	...	...	...	...	...	...	...	...	2	3
West Virginia	...	...	...	...	...	...	...	...	...	3	4	4	5
Wisconsin	...	...	...	...	...	...	...	3	6	8	9	10	11
Wyoming	...	...	...	...	...	...	...	...	...	...	...	1	1

CHAPTER XIX.

COMPOSITION AND ORGANIZATION OF THE SENATE.

ARTICLE I.

Section 3, Clause 1.—The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

289. Number, Election, and Term of Senators.—Every item of this clause was the subject of controversy in the Convention. When it had been settled that Congress should consist of two branches, and that representation should be equal in the Senate and proportional in the House, there remained the questions: How shall the Senators be chosen? For what term shall they serve? and, How shall they vote? Some said they should be elected by the House of Representatives; some, that the President should appoint them from a list of candidates named by the State legislatures; some, that they should be elected by the people; and Mr. Hamilton proposed that they be elected by electors chosen by the people of the several States. The rule adopted was the one most consistent with the general character of the Constitution. Four years, six years, seven years, and life, or good behavior, were named as a suitable term. Six years combines both permanency in the Senate and responsibility in the Senator. An equal vote in the Senate is not the same thing as voting by States; the individual vote gives less prominence to the State idea. Nevada, with a population of 42,335, has the same number of Senators as New York, with 7,268,894. And the rule of the Constitution which makes this possible, is the most permanent part of that instrument (see Art. V.).

Section 3, Clause 2.—Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally

as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

290. Classes of Senators.—On May 15, 1789, the twenty Senators present from the ten States were divided in accordance with this rule. They were first put into three classes, care being taken not to have the two Senators from any State in the same class, and the time for which the classes should serve was then determined by lot. Class one, consisting of seven Senators, should retire in two years; class two, of the same number, in four years; class three, of six, in six years. It was ordered that when additional Senators took their seats, they should be placed by lot in these classes, but in such manner as to keep them as nearly equal in number as possible. Accordingly, the New York Senators were placed in classes three and one; the North Carolina Senators in two and three, and the Rhode Island Senators in one and two.

The years in which the classes retire may be thus exhibited:

Class 1, 1791, 1797, 1803 . . . . . 1899, 1905, 1911
Class 2, 1793, 1799, 1805 . . . . . 1901, 1907, 1913
Class 3, 1795, 1801, 1807 . . . . . 1903, 1909, 1915

The time that a Senator from a newly admitted State serves depends on the date of the State's admission to the Union, and on the state of the classes at the time. He may serve six years, he may serve but a single day. California was admitted to the Union September 9, 1850. The California Senators fell into classes three and one, and John C. Frémont, who had drawn one (or the short term), served only until March 4, 1851.

291. The Senate a Permanent Body.—A House of Representatives continues two years, and an executive administration four. But the Senate, like the Old Congress, is a perpetual body, and it is the custom to keep up a perfect organization. This fact gives the Senate dignity

and adds strength to the government. One reason for this was to show to the world that the American government did not come to an end every two or four years. A Senator appointed by a governor to fill a vacancy holds his seat until the legislature elects a successor to the former incumbent, or, if it fails sooner to elect, to the end of the session of the legislature following his appointment. If a legislature fails to elect, having had an opportunity, the governor cannot fill the vacancy.[1]

Section 3, Clause 3.—No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

292. Senator's Qualifications.—The remarks made concerning the qualifications of the Representative are of equal application to the Senator, only the greater dignity and responsibility of the Senator call for a greater age and a longer citizenship. Two men elected to the Senate have been declared disqualified by reason of an insufficient citizenship: Albert Gallatin, of Pennsylvania, in 1798, and James Shields, of Illinois, in 1849.

Section 3, Clause 4.—The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

293. Vice President's Vote.—As the Vice President is not a member of the Senate, he is not, like the Speaker of the House, entitled to a vote. His casting vote is of no avail unless given in favor of the pending measure; for every question is lost unless it receives a majority. In the early years of the government, when the Senate was small and equally divided politically, the Vice President's position was very important. John Adams had an "unusual number of opportunities to exercise personal power in important matters. Certainly no other Vice President has had

[1] This point was definitely decided at the first regular session of the Fifty-third Congress, in the cases of Senators appointed under such circumstances by the governors of Montana, Washington, and Wyoming.

the like, and probably no officer of the United States has ever been able to do so much by positive acts of individual authority. . . . No less than twenty times during the life of the First Congress he voted for the Federalists." [1]

Section 3, Clause 5.—The Senate shall choose their other officers, and also a president *pro tempore,* in the absence of the Vice President, or when he shall exercise the office of President of the United States.

294. Officers of the Senate.—Under the head of "other officers" the Senate elects a Secretary, Sergeant-at-arms, Chaplain, and two Doorkeepers. The custom is for the Vice President, as soon as convenient after he takes the oath of office, to absent himself from the chair for a day, or longer, in order that the Senate may elect a President *pro tempore.* This office is held at the pleasure of the Senate. As the president *pro tempore* is a member of the Senate, he has a vote on all questions. Accordingly, a tie vote when a Senator is in the chair is always lost.

NOTE.—Within the last few years the proposition to have the Senators elected directly by the people has been received with much favor. The House of Representatives has three times voted by more than a two-thirds majority to submit to the State legislatures the following as an amendment to the Constitution, but the Senate has not concurred:

"That in lieu of the first paragraph of section 3 of Article I. of the Constitution of the United States, and in lieu of so much of paragraph 2 of the same section as relates to the filling of vacancies, and in lieu of all of paragraph 1 of section 4 of said Article I., in so far as the same relates to any authority in Congress to make or alter regulations as to the times or manner of holding elections for Senators, the following be proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three fourths of the States:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people therof, at large, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

"The times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof.

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies; provided that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.

"This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

---

[1] Morse, *John Adams,* pp. 244, 249, 250.

CHAPTER XX.

ELECTIONS OF CONGRESSMEN.

ARTICLE I.

Section 4, Clause 1.—The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

295. State Control.—The grant to the legislatures of power to prescribe the times, places, and manner of holding these elections was a concession to the States. It was made partly to take advantage of the existing machinery for conducting elections, but mainly to avoid arousing State jealousy. There is an evident propriety in giving the legislatures immediate control of the senatorial elections, since the Senators represent the States. Then the States could manage the elections of Representatives more easily and cheaply than the Nation, and with more satisfaction to the people. A denial to the States of participation in the management of these elections would have defeated the whole scheme.

296. Limit of State Control.—Still, in a National system it would not do to put these elections in the exclusive control of the States. Mr. Hamilton said at the time: "Every government ought to contain in itself the means of its own preservation; while it is perfectly plain that the States, or a majority of them, by failing to make the necessary regulations, or by making improper ones, could break up or prevent the first election of the houses of Congress."[1] Hence the provision that Congress may at any time by

[1] *The Federalist*, No. 59.

law make or alter such regulations as the States may make, except as to the places of choosing Senators. Obviously, Congress should not name the places for electing Senators, as that would involve the seat of the State government. With this exception, Congress has absolute power over the whole subject. This grant was not seriously objected to in the Federal Convention, but in the State conventions it was attacked with great violence. The use of the power is discretionary with Congress, and it was a full half century before it was used at all. This abstinence was due to regard for State feeling, to a desire to save expense, and to the fact that State control had proved satisfactory.

297. National Legislation.—Previous to the Twenty-eighth Congress, the States exclusively controlled the elections of Representatives. Some chose them by districts, one or more from a district, and some by the State at large; the first being called the district plan, and the second the general-ticket plan. The objection to the general-ticket plan is that it strongly tends to give all the members to one political party; a State majority, no matter how small, commonly determines the political complexion of the whole State delegation. It is clear that the district plan leads to the juster representation of the people. Hence it was provided in the Apportionment Act of 1842: "That in every case where a State is entitled to more than one Representative, the number to which such State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory, equal in number to the number of Representatives to which the said State may be entitled, no one district electing more than one Representative." This rule, violently opposed at the time, has been incorporated in every subsequent apportionment law. Since 1872 Congress has prescribed that the districts shall contain, as nearly as practicable, an equal number of inhabitants. In 1871 Congress provided that all votes for Representatives must be by written or printed ballots, and in 1872 that the elections should be held on the Tuesday next after the

first Monday in November in every even year. Subsequently the States having in their constitutions clauses fixing a different day, were excepted from the operation of this last rule. In Oregon the day is the first Monday in June; in Vermont the first Tuesday, and in Maine the second Monday, in September; in the other States it is the Tuesday next after the first Monday in November. In 1899 Congress permitted the use of voting machines in elections of Representatives. The Act of 1901 provides that the districts shall consist of "contiguous and compact" territory.

298. Districting the States.—The division of a State into districts is left to its legislature. This duty it commonly performs at its first meeting after Congress makes the decennial apportionment. It is subject only to two rules: that the territory of the districts must be contiguous and compact, and that they must contain relatively equal populations. Sometimes the division is made in such a way as to give the political party having a majority in the legislature an undue advantage. This is done by combining counties, townships, etc., so as to give to one party small or moderate majorities in as large a number of districts as possible, and to the other party large majorities in as few as possible. This process is known as gerrymandering.[1] Some States provide in their constitutions for decennial districting; most, however, do not, and redistricting is not unfrequent. The law in regard to contiguity is held to be satisfied when counties or townships comprising a district touch at the corners, and the law requiring as nearly as practicable an equal number of inhabitants rests lightly on State legislatures. Considerable discrepancies are common when districts are first formed, and these the growth of population tends to enlarge.

[1] "*Gerrymander.* In humorous imitation of *salamander*, from a fancied resemblance to this animal of a map of one of the districts formed in the redistricting of Massachusetts by the legislature in 1811, when Elbridge Gerry was governor. The redistricting was intended (it was believed at the instigation of Gerry) to secure unfairly the election of a majority of Democratic senators. It is now known, however, that he was opposed to the measure."—*The Century Dictionary.*

It is not uncommon for one district in a State to contain double the population of another district.

299. Representatives at Large.—Since 1842 Congress has sometimes allowed States receiving one or more additional Representatives under a new apportionment, to elect them for the whole State when it is impossible or difficult for the legislature to district the State in time for the ensuing election, or when it is not desirable to do so. These are called Representatives at large. Pennsylvania at one time had three such Representatives. The law of 1882 provided that, in cases where no change was made in the number assigned to a State, and the legislature did not otherwise provide, the former districting should stand. In case the number was increased, the additional Representative or Representatives might be elected at large, and the former number by districts, as before. It provided also that "if the number hereby provided for shall in any State be less than it was before the change hereby made, then the whole number to such State hereby provided for shall be elected at large, unless the legislatures of said States have provided, or shall otherwise provide, before the time fixed by law for the next election of Representatives therein."

300. The Election of Senators.—The Constitution prescribes that the State legislatures shall elect the Senators, but is silent as to the manner of electing them. Shall the two houses meet in joint convention, a majority of all electing? Or shall they vote separately, a majority of each house being required to elect? For three fourths of a century each State answered these questions for itself. Serious disagreements between houses ensued, and legislatures were sometimes broken up. To put an end to such controversies, Congress, in 1866, passed a law regulating the election of Senators. This law requires the legislature of each State elected next preceding the expiration of the time for which any Senator was chosen to represent such State, on the second Tuesday after its meeting and organization, to proceed to elect a Senator in conformity with these rules:

1. Each house shall name or propose, by a *viva voce* vote of each member present, one person for Senator; the next day at 12 o'clock the two houses shall meet in joint assembly, and if it appears from the reading of the journals

of the previous day's proceedings, that the same person has received a majority of all the votes in each house, he shall be declared duly elected.

2. If no election has been made, the joint assembly shall then proceed to vote *viva voce* for Senator, and if any person receive a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, he shall be declared duly elected.

3. If a choice is not made on this day, then the two houses shall meet in joint assembly each succeeding day, at the same hour, and shall take at least one vote, as before, until a Senator shall be elected.

4. If a vacancy exist on the meeting of a legislature, said legislature shall proceed on the second Tuesday after meeting and organization to fill said vacancy, as in the previous case; and if a vacancy occurs when the session is in progress, it shall proceed by the same steps to fill it on the second Tuesday after it has received notice of the vacancy.

Section 4, Clause 2.—The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

301. **Number of Sessions.**—Accordingly, every Congress must hold at least two sessions. Some Congresses have held three, the President having called an extra session, or Congress itself having by law or by adjournment provided for one. The term of a Congress begins at 12 M. March 4, following the election of Representatives, 1901, 1903, etc., and continues until 12 M. of the next odd year, 1903, 1905, etc. Still, since 1821 the ordinary meeting day has been the first Monday of December following the beginning of the Representatives' term. There is nothing to prevent the first session, called the long one, continuing until the first Monday of the next December, when it must end, that the new or short session may begin. The short session cannot continue beyond 12 M. March 4 of the ensuing year.

Under the present system, each Congress holds one session after the members of the House of Representatives for the ensuing Con-

gress have been elected. The constitutional interval between the election of a Representative and the beginning of his term is from the Tuesday next after the first Monday in November until the 4th of March following, while the practical interval extends to the first Monday in December next ensuing. It often happens that a House of Representatives, at its last session, does not represent the political opinion and feeling of the country as expressed at the election held the previous November, while the new House, which does represent them, cannot, save in case of a called session, act for more than a year. It has therefore been suggested, with much apparent reason, that the Constitution should be so changed as to make the election of a Representative and the beginning of his term coincide, and to bring on a session of Congress soon thereafter.

NOTE.—By an act approved February 28, 1871, the national government undertook to extend its authority in a general way over the elections of Representatives. It was made the duty of the several Circuit Judges to appoint in each judicial district in their circuits a chief supervisor of elections; also, under certain conditions, to appoint supervisors of elections for the several election districts and precincts within the districts. These supervisors were required to guard and scrutinize the registration lists of voters, to attend the elections, to challenge voters of doubtful qualification for the franchise, to inspect, scrutinize, and count the ballots, and to make returns of certificates and returns to the chief supervisor of the judicial district. The same act also required the marshal of the district and his general deputies to preserve order at the registration and voting places, and to support and protect supervisors in the discharge of their duties; he was also required in certain places, under certain conditions, to appoint special deputies for the express purpose of performing these duties. An attempt made in the Fifty-first Congress to carry national regulation of elections still further failed; while the Fifty-third Congress, at its first regular session, passed a bill, which President Cleveland approved, that repealed all statutes and all parts of statutes then in force relating to supervisors of elections and special deputy marshals for election purposes.

CHAPTER XXI.

IMPEACHMENTS.

ARTICLE I., *Section 2, Clause 5.*— The House of Representatives . . . shall have the sole power of impeachment.

ARTICLE I., *Section 3, Clause 6.*— The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

ARTICLE I., *Section 3, Clause 7.*— Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

ARTICLE II., *Section 4.*—The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE II., *Section 2, Clause 1.*—The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

302. An Impeachment Defined.—An impeachment, under the Constitution, is a solemn declaration laid before the Senate, that, in the view of the House of Representatives, the person impeached is guilty of high crimes and misdemeanors committed in office and should be tried therefor. It is similar to the indictment of a grand jury. It determines nothing as to the guilt or innocence of the person against whom the charge is made. The House of Representatives, in 1867, impeached President Johnson, but the Senate acquitted him.

303. Steps to be Taken.—The following are the principal steps taken in an impeachment case, as laid down in the Manual of the House of Representatives: The House

having resolved that Mr. —— be impeached, sends a committee of its members to the Senate to impeach him in the name of the House of Representatives and of all the people of the United States, of high crimes and misdemeanors in office, to acquaint the Senate that the House will in due time exhibit articles of impeachment against him and make good the same, and to demand that the Senate take order for the appearance of the said Mr. —— to answer to the impeachment. The House receives from the Senate a message that it will take the order demanded, and will give the House due notice. The House adopts articles of impeachment, appoints by ballot five managers to conduct the trial on the part of the House, and orders the managers to lay before the Senate the articles agreed upon, which is duly done. The Senate now notifies the House that it has issued the proper notice to Mr. ——, with an order to file his reply within a given time, and on the day appointed it gives further notice that it is ready to proceed with the case. The House now proceeds to the Senate Chamber to witness the opening of the trial, and then returns to its own chamber and adopts a replication to the answer and plea made by Mr. ——. The preliminaries over, the trial proceeds day by day, the House at first attending as a committee of the whole, but afterwards leaving the case wholly to the five managers.

304. Trial Court.—In the trial the Senate sits as a court of justice; and to remind him that he is not now a legislator, but a judge, each Senator is required to take an oath that he will do impartial justice according to the Constitution and laws. The Vice President or president *pro tempore* of the Senate presides in ordinary cases, but the Chief Justice presides in the case of an impeachment of the President of the United States. The reason for this special rule is that the Vice President is personally interested in the issue, as he would succeed to the presidency in case the President were found guilty.

305. Mode of Trial.—The trial is conducted according

to the rules observed in criminal trials in courts of justice. The House managers maintain their cause; the accused, in person or by counsel, makes his defense; witnesses are sworn and examined, and other competent evidence is presented *pro* and *con;* the managers and counsel submit their arguments. At the close of the trial the doors of the chamber are shut and the Senate proceeds to consider the case.

The voting is conducted according to rule XIV. of the Senate Rules for Impeachment, viz.:

"On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately, and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two thirds of the members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of such articles by the votes of two thirds of the members present, the Senate shall proceed to pronounce judgment, and a certified copy of said judgment shall be deposited in the office of the Secretary of State."

306. **Judgment.**—One of the above quoted clauses says the judgment pronounced upon the accused, if he be found guilty, shall not extend further than his removal from office and disqualification to hold office under the United States; another says it must extend to his removal. It is for the Senate to decide whether the disqualification to hold office in the future shall be pronounced or not, but that is the limit of its discretion. At the same time the person convicted may be proceeded against in the courts, just as though he had not been punished by impeachment, provided he has been guilty of an offense punishable by law. The reason for denying the President power to grant reprieves and pardons in these cases is that such a power would be peculiarly liable to abuse. The question whether an officer may be suspended from the exercise of his office while an impeachment against him is pending, has been often asked but never answered by any competent tribunal.

307. **Limitation of the Power.**—The fourth of the clauses quoted limits impeachment to the President, Vice

President, and civil officers of the United States. Who are, and who are not, civil officers, are questions that have been much disputed. In 1797 the House of Representatives impeached William Blount, a Senator from Tennessee; the Senate decided by a vote of 14 to 11 that Senators are not civil officers in the sense of the Constitution, and dismissed the case without trial, although it expelled Blount under clause 2, section 5, of Article I. If Senators are not civil officers, neither are Representatives. The result is that, according to this view, impeachment is practically limited to the executive and judicial departments of the government. Soldiers and sailors are tried and punished for offenses in connection with their service by military and naval courts.

The action of the Senate in 1797 rests on two or three clauses of the Constitution that appear to exclude Senators and Representatives from the category of officers of the United States. Thus, clause 2, section 6, of Article I. says, ". . . no person holding any office under the United States shall be a member of either House during his continuance in office," and "no Senator or Representative shall, during the time for which he was elected, be appointed to any civil office" etc.

308. Grounds of Impeachment.—Section 4, Article II., states the grounds of impeachment, but not with such clearness as to prevent some uncertainty. Treason and bribery are perfectly well understood. Not so the "other high crimes and misdemeanors" of the section. It has been maintained, for instance, that the impeachment and conviction of a civil officer is constitutional only when he is guilty of an offense punishable by an act of Congress. This is a narrow view; the proper one is that such an officer may be impeached for offenses relating to his official conduct that are not defined, and that cannot be defined, in the law at all, since they cannot be anticipated.

Impeachment is an extraordinary remedy for extraordinary evils. Judge Pickering was impeached and found guilty of drunkenness and profanity on the bench, neither of which offenses is prohibited by law; and nearly all the offenses charged against the persons whom the House of Representatives has impeached were non-indictable ones. In fact, the great reason for giving the House and

Senate rather than the courts jurisdiction in impeachment cases is that the offenses are often official and not covered by the statutes.

309. Two-Thirds Vote.—Obviously, the votes of all the Senators voting should not, as in a jury, be required to convict; nor should a mere majority be sufficient.

The reasons for a two-thirds vote are stated thus cogently by Judge Cooley: "The danger that Senators, chosen as representatives of political parties, will be swayed, consciously or unconsciously, by considerations that should not influence them, is much greater on the trial of a political officer from whose removal or retention party advantages might be expected, than on that of a judge. This was forcibly illustrated by the case of President Johnson, in which, with a few exceptions, Senators divided on the question of guilt strictly according to their political affinities. . . . It would be a calamity of the highest moment if the precedent should be set of the conviction and removal of the President on a partisan vote, and on grounds not sanctioned by the sober sense and mature reflection of the people."[1]

310. Impeachment Cases.—There have been eight impeachment cases under the Constitution, with seven trials and two convictions.

William Blount, Senator from Tennessee; 1797, 1798; five articles relating to violation of the neutrality laws; no trial.—John Pickering, District Judge for New Hampshire; 1803, 1804; four articles charging drunkenness and profanity on the bench, and imprisonment of an attorney for contempt of court; tried, found guilty, removed from office, but not pronounced disqualified to hold office. —Samuel Chase, Justice of the Supreme Court; 1804, 1805; eight articles charging arbitrary and oppressive conduct on the bench, and improper criticisms of the national administration; tried and acquitted.—James Peck, District Judge for Missouri; 1829, 1830; one article alleging arbitrary conduct on the bench in punishing an attorney; tried and acquitted.—W. W. Humphreys, District Judge for Tennessee; 1862; seven articles charging disloyalty in a public speech and in accepting a judgeship under the Southern Confederacy; tried, convicted, and removed.—Andrew Johnson, President of the United States; 1867; eleven articles charging repeated violations of the Tenure of Office Act, and the utterance of indecent and unbecoming threats and harangues about Congress, and the declaration that the Thirty-ninth Congress was no constitutional Congress; tried and acquitted, votes being taken on but three articles.—W. W. Belknap, Secretary of War; 1876; five articles charging malfeasance in accept-

[1] Story, *Commentaries* (4th edition), 780, Note.

ing bribes for appointing and retaining in office a post trader on the frontier; tried and acquitted.— Charles Swayne, District Judge for Northern Florida; 1905; charged with financial irregularities, failure to reside in his district, and abuse of judicial power; tried and acquitted.

311. **The Blount and Belknap Cases.**—Two of these cases presented a perplexing question. The Senate had expelled Blount before the case came on for trial, while Belknap had resigned and President Grant had accepted his resignation immediately on the discovery of his crime and before the House began proceedings against him. The question in either case was whether a man no longer in the service of the government was amenable to conviction on impeachment. The Senate declined to try Blount on the ground that he was not a civil officer, but did not pass on the other point. In the other case, the Senate decided, 37 votes to 29, that the accused was still subject to trial, although now a private citizen. The final vote stood, guilty 37, not guilty 25. There was no doubt that Belknap had been guilty of the offenses charged, but the minority voted *No* on the ground that the Senate had no jurisdiction in such a case.

NOTE.—The process called impeachment originated in England, where the first case bears the date of 1376. There it is a much more sweeping process than in the United States. Not officers alone, but all subjects of the crown may be impeached. The king, however, is not impeachable, the theory being that he can do no wrong, and that responsibility for his acts attaches only to his ministers. Punishment may extend to fine, imprisonment, banishment, and even death, as well as to removal from office. The use of the power in many English cases now seems severe, and in some absurd. There has been no case of impeachment in England since 1804, and arguments have been adduced showing that its exercise is now uncalled for. But in the United States, where legislatures have so much less control over executives and courts of law than in England, the case is otherwise. Sir T. E. May thus speaks for England:

"Impeachment by the Commons for high crimes and misdemeanors beyond the reach of the law, or which no other authority in the state will prosecute, is a safeguard of public liberty well worthy of a free country, and of so noble an institution as a free Parliament; but happily in modern times this extraordinary judicature is rarely called into activity. The times in which its exercise was needed were those in which the people were jealous of the crown; when the Parliament had less control over prerogative; when courts of justice were impure; and when, instead of vindicating the law, the crown and its officers resisted its execution and screened political offenders from justice; but the limitations of prerogative, the immediate responsibility of the ministers of the crown to Parliament, the vigilance and activity of that body in scrutinizing the actions of public men, the settled administration of the law, and the direct influence of Parliament over courts of justice, which are at the same time independent of the crown, have prevented the consummation of those crimes which impeachments were designed to punish. The crown is intrusted by the constitution with the prosecution of all offenses; there are few which the law cannot punish; and if the executive officers of the crown be negligent or corrupt, they are directly amenable to public opinion, and to the censure of Parliament."— *Parliamentary Practice*, p. 733.

CHAPTER XXII.

THE POWERS OF THE SEPARATE HOUSES.

ARTICLE I.

Section 5, Clause 1.—Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

312. **The Houses Judges, etc.**—A house of legislation, to be a really independent body, must know that the persons claiming membership have been duly elected and that they are duly qualified. Hence it must be the judge of those matters. Both houses have rejected men duly elected because they were disqualified, and contested elections have been numerous, particularly in the House of Representatives. For example, at the opening of the Fifty-first Congress there were seventeen such cases in that body.

313. **Contests in the House of Representatives.**—The State authorities conduct all elections of Representatives, under the laws of the State and of Congress. They canvass the votes and decide what persons are elected. The governor gives the Representative his certificate of election. The clerk of the next preceding House makes a roll of the members-elect before the House meets, placing thereon only the names of those persons whose certificates show that they have been regularly elected. Any person whose name is on this roll may take part in organizing the House; but it is still open to the House to inquire into his right to a seat. If a contestant appears to deny the right of such person, all the papers relating to the case required by law are referred by the clerk to the House, and then by the House to a Committee on Elections. These papers are sometimes very voluminous, as the law gives detailed directions for conducting such contests: the serving of notice by the contestant upon

the person declared elected, and the answer of such person; the taking of depositions relating to irregularities in elections at any precinct, and forwarding them to the seat of government. The expense of taking testimony is paid out of the contingent fund of the House, except the personal expenses of the parties. The Committee on Elections investigates the case, not taking new testimony, however, and reports its conclusions to the House. The House decides that one, or the other, or neither of the parties is elected; in the latter case declaring the seat vacant. From this decision there is no appeal. If a vacancy is declared, a new election must be held under clause 4, section 2 of this article.

As neither the law nor the rules of the Senate make any provision for contested senatorships, contests there lie within much narrower compass. The question is not commonly between two men; it is generally whether the single claimant has been duly elected, and this is an inquiry into forms and records.

314. Quorums.—Forty members make a quorum in the House of Commons, although that body consists of 670 members. While the Constitution requires a majority in each house of Congress, it gives a smaller number power to adjourn from day to day, and to compel the attendance of absent members. In the House of Representatives, such number is fixed at fifteen; in the Senate, no particular number is named.

315. Counting a Quorum.—The practice having grown up in the House of Representatives of members abstaining from voting on certain measures, hoping thus to defeat, or at least to delay them, by making the roll-call show less than a quorum, that body adopted at the first session of the Fifty-first Congress, after a severe party struggle, the following rule: "On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the House who do not vote, shall be noted by the clerk and recorded in the Journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business." The Fifty-third Congress adopted a similar rule, but put the counting of members not voting, who were present, in the hands of two tellers named by the Speaker, one from each side of the pending question if practicable, rather than in the hands of the Speaker himself.

316. Power to Compel Attendance.—The power to compel the attendance of absent members is essential to an

efficient house of legislation. Otherwise days, and even weeks, might pass without its being able to transact any business whatever, particularly when a majority is required to form a quorum. In one instance two months elapsed without a quorum being present in the Old Congress, and once Rhode Island broke the quorum by recalling her delegates, in order to defeat legislation to which she was opposed.

317.—**A Call of the House.**—Whether a quorum is present in the House of Representatives, at any time, is ascertained either by calling the roll or by the Speaker's count. If a quorum is wanting, nothing can be done but to adjourn, or to proceed to a call of the House. In the latter case, the doors of the chamber are closed, the names of absent members are called over, and the sergeant-at-arms is furnished with a list of all absentees for whom reasonable excuses are not made. Then the sergeant-at-arms sends messengers, with warrants signed by the Speaker and clerk, to arrest and bring to the House the members whose names are on the list. This is taking them into custody, from which they must be regularly discharged before they can take their seats. On the appearance of a quorum, all further proceedings under the call of the House are commonly dispensed with, and business goes on as before.

In the Senate the procedure is less complicated; if it appears on the call of the roll for such purpose that there is no quorum, a majority of the Senators present may direct the sergeant-at-arms to request, and when necessary to compel, the attendance of the absent Senators. In the interval, no business is in order except to adjourn.

Section 5, Clause 2.— Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

318. **Power to Make Rules, etc.**—That each house should have the power to make its own rules is obvious. The Senate rules continue in force until changed; but each House of Representatives, since it is a new body, makes its own rules. It is usual for a house at first to adopt the rules of the last one, in part or whole, until others are adopted. Experience has shown what rules are needed, and the house rules change but slowly. Until the House adopts rules, business proceeds under the common parliamentary law. Each house has its own committee on rules.

All rules of proceeding in deliberative bodies in English-speaking countries are based on the law of Parliament. This law consists of the customs, precedents, and rules that govern the transaction of business in Parliament, and is the growth of centuries. Many of these rules are inapplicable in the American Congress, while other rules are required. Moreover, owing to the different constitution of the Senate and the House, the difference in the size of the two bodies, and their partly different duties, they require different rules of proceeding. Speeches in the Senate are not limited in length by any rule, but in the House they cannot exceed an hour without special permission. The House rules authorize the previous question (or *closure*), whereby debate can be terminated and a vote on the main question be brought on; but this motion the Senate rules do not permit.

319. **Punishment and Expulsion.**—Senators and Representatives are punished or expelled for conduct unbecoming their official character. For example, Jesse D. Bright, Senator from Indiana, was expelled from the Senate in 1862 for disloyalty in having, in a private letter, afterwards published, recommended to Jefferson Davis, President of the Confederate States, the inventor of an improvement in firearms. The House also has exercised its power to punish and expel in a number of cases, and in 1842 it reprimanded Joshua R. Giddings, of Ohio, for introducing certain resolutions in respect to slavery. While the power of expulsion is very properly conferred upon the houses, the rule requiring a two-thirds vote for that purpose is obviously a wise one.

Section 5, Clause 3.—Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the Journal.

320. **Modes of Voting.**—The House of Representatives votes in several different ways. The most common way is *viva voce,* the presiding officer deciding the vote by the sound. If he is in doubt, he asks the members to rise while he counts them. If his decision is questioned, he appoints two tellers, or " counters," who count members as they pass between the tellers, and announce to him the result, which

he then announces to the House. This is called a division. When the vote is by yeas and nays, the clerk calls the roll, and records after each man's name "yea," "nay," "absent" or "not voting." The object of entering the yeas and nays upon the Journal is to inform the public how their representatives vote on questions. As the expression is, "it puts a man on the record," which the other methods of voting do not do.

On any important question, at least if there is a divided opinion, the roll is pretty certain to be called; and the Constitution expressly requires it when a vetoed bill is put upon its passage. The House votes by ballot when it elects the President. The rules of the Senate recognize no vote but that by yeas and nays. Members of the House of Lords vote "content" and "not content" on the call of the roll; the House of Commons divides, the members going into the lobby, where they are counted.

321. **Dilatory Motions.**—Members who are opposed to a pending measure on which a vote is about to be taken, in order to defeat it by delay, when they cannot by voting, sometimes make dilatory motions, as to adjourn, and call for the yeas and nays on every question, with a view of using up the time and forcing an adjournment. This is popularly called "filibustering." The Constitution has therefore wisely provided that the demand for the yeas and nays must be supported by one fifth of the members present. In the Old Congress one member could make this call.

Section 5, Clause 4.— Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

322. **Adjournment.**—This clause prevents those interruptions of business, and that friction between the houses, which would ensue provided either house should adjourn to such place and for such time as it pleased. The two houses can, however, adjourn to another place than the seat of government; and the President is by law authorized, whenever Congress is about to convene, and he thinks life or health would be hazarded by meeting at the capital, owing to contagion or other circumstances, to convene it by proclamation at some other place.

323. Power to Punish for Contempt.—A legislative body has the right, and is in duty bound, to conduct proper investigations into the conduct of public affairs. It may call witnesses to its bar, or it may appoint an investigating committee, giving to it power to send for persons and papers. For many years both houses of Congress had been in the habit of punishing witnesses for contempt who refused to answer questions put to them on such investigations, sometimes even sending them to jail. In the celebrated case of Kilbourn *v.* Thompson,[1] the Supreme Court held that — although the House of Representatives can punish its own members for disorderly conduct, or for failure to attend its sessions, can decide cases of contested elections, determine the qualifications of its members, exercise the sole power of impeachment of officers of the government, and may, when the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness — there is not in the Constitution of the United States any general power in either house to punish for contempt. Neither house has authority to extend such an inquiry into the private affairs of the citizen. Kilbourn had been committed to jail by the House of Representatives for refusing to answer questions addressed to him relating to his private business. The decision referred to was rendered in *habeas corpus* proceedings which gave him his liberty.

[1] 103 U. S. Reports, 168.

CHAPTER XXIII.

RIGHTS OF SENATORS AND REPRESENTATIVES.

ARTICLE I.

Section 6, Clause 1.—The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

324. Members of Congress to be Paid.—Members of Parliament receive no compensation whatever. The two main objections to such a practice are that the state has no more right to demand the services of citizens than to demand their property, without a just compensation, and that it tends to exclude poor men from the legislature. Hence the Federal Convention agreed that members of Congress should be paid. Still, it was urged by some distinguished members, as General Pinckney and Dr. Franklin, that Senators, since they would represent the wealth of the country, should be denied compensation, and such a proposition received the votes of five States.

325. National Payment.—A question much more earnestly contested was, how payment should be made. Some members contended that the members of the new Congress, like the members of the old one, and especially Senators, should be paid by the States. Men tended to divide on this question as they divided on the question of the nature of the government to be constituted. The arguments of those who contended for National payment were, that it

was unjust to ask the States to pay for services rendered to the Nation; that the several States would compensate their members at different rates, thus begetting jealousy and heartburning; and that some of the States might make the pay so low as to substitute for the question "Who is most fit to be chosen?" the question "Who is most willing to serve?" Furthermore, Mr. Madison said State payment would prevent that very stability in the government which they were seeking to gain; Senators would become the mere agents of State interests and views, instead of being impartial guardians of the public good. Mr. Hamilton presented the same argument in the tersest form: "Those who pay are the masters of those who are paid." These arguments were decisive as to the source of payment.

326. Compensation Left to Congress.—Still another question was, whether the amount of the compensation should be fixed in the Constitution or be left to Congress. On the one hand, it was urged that the pay would need to be changed from time to time, and that it would be difficult or impossible to amend the Constitution; and on the other hand, that Congress would be likely to abuse the power. It was also proposed that Congress should fix the compensation only once in twelve years. The matter was finally left to the law-making power.[1]

327. Retroactive Compensation.—Each Congress has absolute power over its own pay, subject to the President's veto. In every case of change, no matter when made, it has had effect from the beginning of the Congress making it. In other words, every law has been retroactive. The law of March 16, 1816, reached back to March 4, 1815; the law of August 16, 1856, to March 4, 1855; the law of March 3, 1873, to March 4, 1871, or two full years. The laws of 1816 and 1873 provoked severe criticism throughout the country. It was the popular opinion that the increased compensation was excessive; and that the retroactive feature, although constitutional, was improper and incompatible with the character of Congress. In both

[1] This amendment, which failed to secure the requisite number of ratifications, was the second one to be proposed in 1789: "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened."

these cases the ensuing Congress hastened to repeal the obnoxious legislation.[1]

328. Exemption from Arrest.—The exemption of Senators and Representatives from arrest, to the extent defined, is necessary to the proper representation of the people and to the independence of Congress. If a member of either house could be arrested and detained on any charge for which the common citizen is liable to arrest, his constituents might be deprived of his services. But manifestly this exemption should not cover the grave offenses enumerated: treason, bribery, and breach of the peace. The exemption does not extend to vacations between sessions; but a member happening to be in custody must be discharged, save in the enumerated cases, in time to allow him to reach the capital at the opening of a session.

329. Not to be Questioned.—The clause "they shall not be questioned in any other place," means they shall not be held responsible out of Congress for words spoken in Congress. This rule is as essential to freedom of debate as the former one is to the freedom of representation. However, just how far this privilege extends is doubtful. In England it does not extend to a speech made in Parliament and published by its author, and a member may be prose-

---

[1] The following table exhibits the compensation of members of Congress at different times:

1789-1815	$ 6 a day.
1815-1817	1,500 a year.
1817-1855	8 a day.
1855-1865	3,000 a year.
1865-1871	5,000 a year.
1871-1873	7,500 a year.
1873-	5,000 a year.

Except in the period 1815-1817, members have always received mileage. Down to 1815 it was $6 for every twenty miles of necessary travel, going to and returning from the capital. From 1817 to 1865 it was $8 for every twenty miles of such travel. From 1865 to 1871 it was only twenty cents a mile. In 1871-73 it was the actual expenses of travel. Since 1873 it has been the same as from 1865 to 1871. The Speaker of the House and President *pro tempore* of the Senate, when there is no Vice President, receive each $8,000 a year; at other times the President *pro tempore* receives merely his Senator's salary. For the single year 1795 Senators were paid one dollar *per diem* more than Representatives.

cuted for libelous matter contained in such speech. Judge Cooley thinks that, in this country, where all debates in Congress are published by law, the privilege must also cover the publication.[1] The rule is confined strictly to what is said in the house or in committee, in the discharge of legislative duty; the words "speech or debate" cover whatever is said or done in the transaction of public business.

Section 6, Clause 2.—No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time, and no person holding any office under the United States shall be a member of either house during his continuance in office.

330. **Reason of the Rule.**—The President is often interested in seeing certain measures become laws; and if he had the power to make such appointments as are here forbidden, he might make them, or promise to make them, for the purpose of inducing members to vote for such measures. Further, he might aid in creating new offices, or in increasing the salaries of old ones, for the sake of corrupting members with them. The clause tends to prevent bargains and understandings between the executive and members of Congress, and so to keep the two branches practically separate and distinct. At the same time, a Senator or Representative may, immediately on the expiration of the term for which he was elected, receive such an appointment; or he may, while serving, be appointed to an office created before his election, if he resigns his seat.

NOTE.—What is sometimes called Cabinet government prevails in England and in some other countries. The leading members of the English Ministry sit in one or the other of the houses of Parliament. The premier is either a prominent Lord or a prominent Commoner, and for the time the leader of his political party. The legislative and executive branches are intimately connected; the Ministry takes the initiative in the most important legislation, and is for the time clothed with, and is responsible for, the exercise of the powers of the crown. The Ministry is popularly called the Government, and also the Administration. No Ministry can stand long in the face of a hostile majority

[1] *Constitutional Limitations*, p. 594.

in the House of Commons. Indeed, the Ministry has been called, not unaptly, a committee of that house. This system, which has grown up since the time of Queen Anne, is essential to the very existence of government as now carried on in the United Kingdom. It has been proposed to admit the heads of our executive departments to the floors of Congress for the purpose of discussion when measures relating to their own departments are under debate. Bills or resolutions involving that plan have been before both the Senate and the House of Representatives at different times, but no action has been taken in either body. Neither has the proposition ever received the public approval nor attracted much public notice.—Bagehot, *The English Constitution;* Wilson, *Congressional Government;* Fiske, *The Critical Period in American History;* Bryce, *American Commonwealth,* Chaps. IX.-XVI.; article on "Ministry," in Lalor's *Cyclopædia.* See also a speech by President Garfield, "Cabinet Officers in Congress," *Works,* Vol. I., p. 61.

CHAPTER XXIV.

ENACTING LAWS.

ARTICLE I.

Section 7, Clause 1.—All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

331. Controversy over the Clause.—Perhaps no clause of the Constitution was more seriously contested than this one. At first the Convention gave the exclusive power of originating revenue bills to the House of Representatives as a compensation to the large States for conceding equal representation in the Senate to the small ones. Then the clause was thrown out, "thereby nearly unhinging the whole plan," as one of the members put it. Later it was restored as a concession to the large States for yielding to the Senate the right to ratify treaties and the power to try impeachments. Still, one hundred years have not settled the extent of the right conceded to the House.

332. Bills for Raising Revenue.—What are bills for raising revenue in the sense of the Constitution? It is clear that the language does not include appropriation bills and that it is limited to taxation. But does it include bills to diminish or repeal taxes, as well as bills to increase or create them? On the one hand, it is contended that a bill to repeal or reduce taxes, is not a bill to raise revenue. On the other hand, it is replied that repealing or reducing taxes cannot be separated from levying taxes, since the abolition or repeal of one tax may render the increase or creation of another one necessary, or even demand the recasting of a whole revenue system. These may be called the Senate view and the House view respectively, and each body maintains that history is on its side.

333. The Origination of Money Bills.—The House has, at different times, returned to the Senate, or refused to consider, bills that the Senate had originated, on the ground that they were infractions of this clause. In 1871 the Senate passed a bill repealing an act extending the income tax, which the House returned as such infraction. Conference committees were appointed to adjust the difference, but the committees could not agree. The House committee maintained that the House has the right to originate all bills relating directly to taxation, including bills imposing or remitting taxes; the Senate committee maintained that the Senate may originate bills repealing laws or portions of laws imposing taxes, even if the repeal render necessary the imposition of other taxes. In 1872 the Senate substituted for a House bill to repeal existing taxes on tea and coffee, a bill containing a general revision of the laws imposing customs duties and internal taxes. The House laid it on the table. The Senate adopted a report declaring, in effect, that it had no right to engraft on this particular House bill the substitute that it had adopted, but the House took no further notice of the matter. Again, in the session of 1888-89, the House passed a bill to reduce taxation and simplify the revenue collection laws; the Senate, under the form of an amendment, substituted a bill revising in a general way customs duties and internal taxes; the House Committee on Ways and Means reported a resolution declaring this unconstitutional, but the House never acted on the resolution.

While appropriation bills are not bills for raising revenue, still the practice has been for the House to originate them. The House has commonly laid on the table such bills coming from the Senate. President Garfield said in 1871: "Up to this time no general appropriation bill which originated in the Senate ever became a law."[1] The practice still is for the House to originate the general appropriation bills, but less stress is laid upon the privilege than for-

[1] Speech in H. R., "The Right to Originate Money Bills," *Works*, Vol. I., p. 674.

merly. Each house has a Committee on Appropriations, but only the House of Representatives has a Committee on Ways and Means.

334. **Reason of the Rule.**—When it was determined that representation in the Senate should be equal, and in the House according to numbers, the large States insisted upon inserting a rule in regard to money bills in the Constitution. In no other way, they said, could their property be protected against unfair taxation. The value of this concession was greatly over estimated by the large States, because of a mistaken belief that the American Senate and House of Representatives stand in the same relation to the American people that the House of Lords and House of Commons stand to the English people.[1]

Section 7, Clause 2.— Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If, after such reconsideration, two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the Journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

---

[1] The rule is well settled in England that the House of Commons controls the public purse. The House of Lords can neither originate tax bills and appropriation bills, nor amend them; it is practically denied the privilege of voting against them when they are matured by the Commons. The exclusive control of the purse by the lower house represents much of the political progress made in England the last six hundred years. The principle on which this rule rests is the one that the Revolutionary Fathers contended for, viz., no taxation without representation. The House of Commons consists of the representatives of the nation; the House of Lords is an hereditary body. The people's money can be voted only by the people's representatives. See Sir T. E. May, *Parliamentary Practice*, 10th edition, pp. 50, 553, *et seq.*

335. **Reason for the Veto Power.**—The argument by which this power of the President, popularly called the veto, is defended, is the familiar one of checks and balances. Congress is liable to pass bills that ought not to become laws; the President's negative may defeat them, or effect modifications; at all events, they ought not to become laws unless they secure a two-thirds vote of each House. Nor is it easy to pass a law over the veto. The President sends his objections to the house in which the bill originated, where they are entered in full on the Journal. The vote is by yeas and nays, and must also be entered on the Journal. If the bill fails to receive two thirds of the votes given, the matter goes no farther; but if it receive that vote, then it goes to the other house, where it must pass the same ordeal.

336. **Effects of a Refusal to Sign.**—Sometimes the President neither signs nor vetoes a bill, when it becomes a law without his signature on the expiration of ten days (Sundays not included), unless Congress sooner adjourns. Hence there are three ways, so far as the President is concerned, in which a bill may become a law. By simply retaining it, the President can defeat any bill that comes to him within ten days of the close of the session. He is popularly said, in this case, to "pocket" the bill or to give it a "pocket veto." This silent veto is absolute, and important measures have been defeated in this way.

337. **The Veto in the Convention.**—The colonial governors, save those of Connecticut and Rhode Island, who had no such power, used the veto vigorously. The Declaration of Independence charged the king with "refusing his assent to laws the most wholesome and necessary for the public good," and with "forbidding his governors to pass laws of immediate and pressing importance," etc. Naturally, the people were afraid of such a dangerous power, and Massachusetts was the only State that, in its first constitution, gave its executive even a qualified veto. The whole subject was warmly debated in the convention. It was proposed to make a council of revision, consisting of the President and the Supreme Judges; to make the President's negative absolute; and to give the national government a veto on State legislation. Finally, the moderate and necessary provision that we are discussing was agreed to. The exercise of the

veto power has often given rise to much political controversy. Its free use by President Jackson was one cause of the organization of the Whig party.[1] Nominally the British crown has an absolute veto on all bills passed by Parliament, but it has not been used in a single instance since 1707.

Section 7, Clause 3.— Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

338. **Bills, Orders, and Resolutions.**—A bill is a form or draft of law presented to a legislative body, but not yet enacted into a law. The enacting clause of a national law is, "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled." Mr. Jefferson thus distinguishes between an order and a resolution: "When the house commands, it is by an order. But facts, principles, and their own opinions and purposes are expressed in the form of resolutions."[2] Joint resolutions have the resolving clause, "Resolved by the Senate and House of Representatives." Joint resolutions are not distinguishable from bills, and are subject to the same rules. Other forms of resolutions are resolutions by the separate houses and concurrent resolutions. Were

[1] **Presidential Vetoes.**— In the first hundred years under the Constitution Washington vetoed 2 bills, Madison 6, Monroe 1, Jackson 12, Tyler 9, Polk 3, Pierce 9, Buchanan 7, Lincoln 3, Johnson 21, Grant 43, Hayes 12, Arthur 4, Cleveland 301, making 433 in all. One bill was passed over Tyler's veto, 5 over Pierce's, 15 over Johnson's, 4 over Grant's, 1 over Hayes's, 1 over Arthur's, and 2 over Cleveland's, making a total of 29. Several of the Presidents have sent to Congress protests relative to their exercise of the veto power. Previous to the 4th of March, 1889, 453 bills became laws by the 10-days' rule; 2 in Buchanan's term, 1 in Lincoln's, 18 in Johnson's, 136 in Grant's, 13 in Arthur's, and 283 in Cleveland's. All the Presidents previous to President Harrison signed 21,759 acts and resolutions. The total of such acts and resolutions to find a place in the statute book within the same limits is 22,246. The bills vetoed may be divided into two classes: those deemed unconstitutional, and those deemed unnecessary or inexpedient, the second being by far the larger class.— See *Harvard Historical Monographs*, No. I., 1890.

[2] *Manual of Parliamentary Practice.*

it not for this clause, Congress might defeat, at least partly, the operation of the preceding one by calling its acts motions, votes, or resolutions instead of bills.

339. **Limitations of the Veto.**—In 1794 the objection was made, in the case of Hollingsworth *v.* Virginia,[1] that Amendment XI. had not been constitutionally adopted, because it had not been presented to the President for his approval. The Attorney-General replied that this had not been done in case of the ten amendments previously adopted. He argued, also, that an amendment "is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the President with a qualified negative on the acts and resolutions of Congress." The Supreme Court unanimously sustained this view, and declared the amendment a part of the Constitution. And yet the so-called "Douglas Amendment" was sent to President Buchanan, who approved it, March 2, 1861. In February, 1865, Congress sent to the President a joint resolution declaring that certain States were not entitled to presidential electors because they were then in rebellion against the government. President Lincoln signed the resolution, but sent to Congress a message declaring this unnecessary, as the two houses had exclusive authority, under the Constitution, to count the electoral votes. In March, 1866, the houses adopted a concurrent resolution declaring that no Senator or Representative should be admitted into either branch of Congress from any of the eleven States then considered in rebellion, until Congress should have declared such State entitled to such representation; and this resolution President Johnson was not asked to approve.

340. **The Committee System.**—Experience has proved it to be impossible for a large legislative assembly to do business efficiently without some interior organization whereby a few directing minds shall be charged with the preparation and conduct of business, either in whole or in part. This necessity has been met by different legislatures in different ways; but Congress has met it by the appointment of standing committees, so called because they are constituted according to the rules of the two houses, and because they continue in charge of the same general subjects for a whole Congress, or a period of two years. The Senate committees are immediately chosen by the Senators voting by ballot, but the elections are practically controlled by party caucuses; the House committees are appointed by the Speaker. In either case the man first named on the committee is its chairman. The committees in each house consist

[1] 3 Dallas, 378.

of from three to seventeen members each. The committees originate some measures, and to them bills that are introduced by members are referred on their second reading, the particular committee designated being determined by the nature of the subject. Except that it may be instructed by vote of the house to which it belongs, a committee does what it pleases with the bills referred to it, reporting them back as introduced, reporting them back with amendments, or, in most cases, paying no attention to them whatever. The committee may hear the author of a bill on its merits; it may take evidence relative to the matter, or listen to arguments from citizens who are especially interested in it; it examines the subject in its own way, and declares its mind by the vote of its members. Frequently the bills that are reported back from committees are largely or wholly made over. The rules are so constructed as to place a certain amount of time each session at the disposal of each committee. There are also select committees, appointed like the regular ones, whose existence expires on the performance of their special duties. In January, 1904, the Senate had fifty-five standing committees; the House, sixty. Necessarily some members' names appear on several committee lists. In both houses, and particularly in the lower house, the several committees exercise great power over the course of legislation. This is especially true of the Committee on Rules, which often decides practically whether the House of Representatives shall consider a subject or not. The Speaker, who appoints the committees, and is always a member of the Committee on Rules, is clothed with an enormous influence over law-making that lies wholly outside the pale of the Constitution and the laws.[1]

[1] Mr. Bryce, pointing out the evils of the committee system, says: "Since the practical work of shaping legislation is done in committees, the interest of members centers there, and they care less about the proceedings of the whole body. It is as a committeeman that a member does his real work. In fact, the House has become not so much a legislative assembly as a huge panel from which committees are selected. Except in exciting times, when large questions have to be settled, the bulk of real business is done, not in the great hall of the House, but in this labyrinth of committee rooms and the lobbies that surround them." Vol. I., pp. 159-161. (1894.)

Prof. A. B. Hart observes: "The powers now exercised by the Speaker will probably be exercised by each succeeding Speaker, and will somewhat increase. Since the legislative department in every republic constantly tends to gain power at the expense of the executive, the Speaker is likely to become, and perhaps is already, more powerful, both for good and for evil, than the President of the United States."— *Practical Essays on American Government*, p. 19. See also Woodrow Wilson, *Congressional Government.*

CHAPTER XXV.

THE GENERAL POWERS OF CONGRESS.

Article I.

The preceding sections constitute the two houses of Congress and define some of their separate powers. We come now to a particular enumeration of what are called the general powers of Congress. Section 8 of Article I. is second in importance to no other section of the Constitution; its eighteen clauses are the engine that drives the whole machinery of the government, and without them that machinery would never have moved. Professor Johnson has well said: "The most solid and excellent work done by the Convention was its statement of the powers of Congress (in section 8 of Article I.), and its definition of the sphere of the federal judiciary (in Article III.)." The several clauses of the section all depend upon the declaration, "The Congress shall have power."

I. Taxation.

Section 2, Clause 3.— Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined. . . .

Section 8, Clause 1.—The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

341. Necessity of this Power.—The national taxing power is very comprehensive, and properly stands at the head of the list of powers granted to Congress. Revenue is the lifeblood of government. "Without the possession of this power," says Justice Story, "the Constitution would

have long since, like the Confederation, dwindled down to an empty pageant. It would have become an unreal mockery, deluding our hopes and exciting our fears. It would have flitted before us a moment, with a pale and imperfect light, and then have departed forever to the land of shadows."

342. Kinds of Taxes.—A tax is a regular pecuniary charge imposed by government upon the people for its own support. Capricious and arbitrary levies imposed by a conqueror or tyrant are not proper taxes. The Constitution makes two kinds of taxes, direct and indirect, although the second term is not used.[1] The Supreme Court has decided that poll taxes, and taxes on land and personal property, including taxes on income from land and personal property, are direct taxes.[2] Indirect taxes are collectively called duties, imposts, and excises without discrimination. Direct taxes, like Representatives, are apportioned among the States according to their respective numbers of population (Article I., section 2, clause 3); indirect taxes must be uniform throughout the Union. In 1820 the Supreme Court decided that the power of Congress to levy and collect taxes is coextensive with the national territory, but that it is optional with Congress to extend the laws imposing them over the Territories and District of Columbia.[3]

343. Direct Taxes.—Direct taxes have proved to be much less important than was anticipated in 1787. The taxgatherer is never a welcome visitor, and least of all when he pries closely into people's private affairs. Taxes on consumption, as on imports collected at a seaport, or on liquors, tobacco, etc., collected at the place of manufacture, have proved more consonant with popular feeling than

---

[1] Writers on Political Economy, in distinguishing between direct and indirect taxes, do not draw the line where the Constitution draws it. As defined by them, a direct tax is one paid by the person on whom it is assessed, while an indirect tax is immediately paid by one person, but ultimately paid by another.

[2] Springer *v.* the United States, 102 U. S., 586. See paragraph 346.

[3] Loughborough *v.* Blake, 5 Wheaton, 317.

taxes paid at the citizen's own door. Consequently, Congress has, in the main, abandoned the field of direct taxation to the States. Only five times in the history of the national government have direct taxes been levied: 1798, 1813, 1815, 1816, 1861. The several acts bearing these dates have declared the whole amount to be raised by the tax, as $2,000,000 in 1798 and $20,000,000 in 1861, and have apportioned the amounts among the States according to the constitutional rule; they have specified the property on which the tax was to be levied, and created machinery for its collection. The early acts placed the tax on slaves and lands, the last one placed it on lands alone. The tax of 1815 embraced the District of Columbia, and that of 1861 the Territories also. Some of these acts, as the last one, have offered the States the option of assuming the tax, coupled with a percentage for its collection. When this is done the State levies and collects the tax as it pleases. The States that formed the Southern Confederacy did not pay the tax of 1861 until the close of the war, and not then in full. In 1891 Congress refunded to the States, Territories, and District of Columbia what they had paid.

Since 1861 the two great sources of revenue have been customs and internal taxes. For instance, for the fiscal year ending June 30, 1897, the total income of the government was $430,387,167.89, of which customs yielded $176,554,126.65; internal revenue, $146,688,574.29; the postal service, $82,387,167.89. The total expenditure for the same year was $448,438,622.30.

344. Duties, Imposts, and Excises.—It is impossible to make close distinctions between the terms duties, imposts, and excises. The words no doubt include every form of indirect tax. Duties are customs levied on imported goods. Imposts are sometimes duties, but commonly the word is used in a broader sense, as synonymous with tax. Excises are internal taxes, as duties are external ones. The national taxes on whisky, malt liquors, and tobacco are all excises. It is said that the word excise is not found in the national laws, and in common speech internal taxes, or

internal revenue, has taken its place. To distinguish between direct and indirect taxes has given rise to much litigation, and the Supreme Court has decided that taxes on carriages,[1] on the income of corporations,[2] and on bank circulation[3] are not direct taxes but excises.

345. Internal Revenue.—As already stated, what the Constitution calls excises are now known as internal taxes or internal revenue. At only two periods had such taxes been levied by Congress previous to the Civil War. From 1791 to 1803 some excises were imposed, and the Whisky Insurrection in western Pennsylvania resulted from the tax on whisky. In 1813 war compelled the government again to resort to this form of taxation, but only to abandon it five years later. Some internal taxes were imposed in 1861, and the Internal Revenue Bureau was created the next year. Progressively, taxes were imposed upon almost everything that could be made to yield revenue. A high foreign authority has said that no other nation would have endured a system of excise duties so searching and burdensome. In 1801 the income from excises was $1,048,000; in 1816, $5,124,000; in 1866, $309,226,000. In 1866 the repeal of these taxes began and continued until but few were left. The Spanish War calling for more money, an act was passed bearing the date of June 13, 1898, which created once more an extensive system of internal revenue. Taxes on liquors and tobacco were increased, and new taxes were levied on bankers and brokers, insurance of all kinds, leases, and many other persons and interests, including a long list of stamp taxes. Most of these taxes were repealed in a few years.

346. Income Taxes.—To meet the needs of the government growing out of the Civil War, Congress imposed in 1861 a tax of 3 per cent. on all incomes over $800. It was the first tax of the kind under the Constitution. The next year the tax was made 5 per cent. on incomes less than $5,000, with an exemption of $600 and house rent actually paid; 7½ per cent. on incomes of $5,000 and not over

[1] Hylton *v.* U. S., 3 Dallas, 171.
[2] Pacific Insurance Co. *v.* Soule, 7 Wallace, 433. See paragraph 346.
[3] Veazie Bank *v.* Fenno, 8 Wallace, 533.

$10,000, and 10 per cent. on all incomes in excess of the last named sum. In 1869 a special income tax of 5 per cent. was laid on all incomes of $600. There was subsequent legislation down to 1872, when the tax expired by limitation.

Income tax features were incorporated in the act to reduce taxation, to provide revenue, etc., which took effect August 26, 1894, without the President's approval. The rate was made 2 per cent. on all incomes over $4,000, derived from property, salary, trade, etc., not including necessary expenses, taxes, and interest, carried on in the United States or elsewhere, and it applied to corporations, companies, and associations, as well as private individuals, but not including partnerships. By two decisions, which are popularly known as the income tax cases, the Supreme Court completely nullified this legislation. It ruled in the decision rendered May 20, 1895, that taxes on the rents or income of real estate are direct taxes, equally with taxes on real estate itself; also that taxes on personal property, or on the income of personal property, are likewise direct taxes. The court therefore held that the tax imposed on incomes by this act was unconstitutional, void, and invalid, because the act did not apportion it among the States according to their respective numbers, but rather treated the tax on incomes as an excise. These conclusions are apparently at variance with previous decisions of the court in regard to direct taxes. The court was divided, five members voting against the law and four for it. (See paragraphs 343-344.)[1]

347. Question of Construction.—There is an old question concerning the interpretation of the first part of the second clause quoted above. Do the words "to pay the debts," etc., limit the words "to lay and collect taxes," or the words "shall have power?" In other words, has Congress power only to collect taxes in order to pay the debts and provide for the common defense and the general welfare, or has it power to collect taxes without reference to these objects? The one construction limits the taxing power to certain designated ends; the other imposes no limit whatever. There is little doubt that the first view is the true one. The question, perhaps, is rather more curious than practical.

II. Loans, Coinage, and Currency.

Section 8, Clause 2.— To borrow money on the credit of the United States.

Section 8, Clause 5.— To coin money, regulate the value thereof, and of foreign coin. . . .

---

[1] Pollock *v.* Farmers' Loan and Trust Co., 157 U. S., 429; Pollock *v.* Farmers' Loan and Trust Company (rehearing), 158 U. S., 601.

Section 10, Clause 1.—No State shall . . . coin money, emit bills of credit, [or] make anything but gold and silver coin a tender in payment of debts. . . .

348. Extent of the National Authority.—The foregoing clauses are delegations of power to Congress covering the whole subject of coinage, currency, and banking, as well as the making of loans on the national credit. The several powers or functions cohere so closely that they cannot be separated in practice. Moreover, the Supreme Court has decided that Congress has the right to regulate all bank issues that circulate as money.[1] But Congress was slow to exercise these great powers, and it never fully exercised them until compelled to do so by the pressure of the Civil War.

349. Power to Borrow Money.—Power to borrow money is almost as necessary to a government as power to levy taxes. Ordinary expenditures may be met by taxation, but in times of war or other emergency this resource is likely to prove inadequate. For example, the ordinary revenues of the United States increased from $41,476,000 in 1861 to $579,949,000 in 1865; the public debt, from $90,580,000 to $2,773,336,000 in the same time.

350. National Bonds.—One way in which Congress borrows money is to sell bonds. These are the nation's promises to pay specified amounts, within a specified time, with interest at specified rates. During the Civil War, more than five billions of dollars of such bonds were sold, many of them to replace others that were cancelled. Upon most of these issues the government paid six per cent interest, but the major part has been paid off and the remainder replaced with other bonds at much lower rates. The issue made under the Act of 1900 bears only two per cent.

351. Treasury Notes.—A second way in which Congress borrows money is to issue treasury notes, called by the Constitution bills of credit. The Continental money

[1] Veazie Bank *v.* Fenno, 8 Wallace, 533.

consisted of such notes or bills. Such notes were issued under the Constitution at various times before the Civil War. Some of them bore interest, some were due on demand, some were payable to bearer and some to order, and some were receivable in payment of dues to the treasury. The government paid them to such of its creditors as were willing to take them, and redeemed them in accordance with the terms of the laws under which they were issued. The notes made payable to bearer commonly circulated as money, but none of the notes issued before 1862 were a legal tender.

352. **The Legal-Tender Act.**—By an act approved February 25, 1862, Congress declared an issue of notes then authorized "lawful money and a legal tender in payment of all debts, public and private, except duties on imports, and interest on the bonds and [interest-bearing] notes of the United States." This issue was limited to $150,000,000, but it was followed by other issues until $450,000,000 had been authorized; afterwards the amount was reduced to $346,681,016. The government interest was excepted from the legal-tender clause, because the public credit could not be maintained unless this interest was paid in coin, and customs duties were excepted in order to create a fund of coin with which to pay it. The people who received these notes in payment of debts really loaned the government corresponding amounts; and as they were compelled to take them in payment of debts, the notes represented a forced loan. Their issuance was a suspension of specie payments.

353. **Constitutionality of the Act.**—Opponents of this measure denied that the Constitution had delegated any such power to Congress. Its champions replied that Congress had power to borrow money, and that it was its duty to provide for the common defense. It was expressly stated at the time, however, that the legal tenders were a war measure, and that Congress would have no right to issue them in time of peace. The Supreme Court decided in 1868[1] that the legal tender clauses of the Acts of 1862 and 1863 were unconstitutional so far as they applied to debts contracted before the passage

[1] Hepburn *v.* Griswold, 8 Wallace 603.

of those acts; but a year later the court reversed this decision and affirmed the constitutionality of the clauses.[1] In 1884 the court made a further decision which was a complete reversal of the view held by the champions of legal tenders in 1862-63. The Reporter sums up the opinion of the court in the following propositions:

"Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war.

"Under the Act of May 31, 1878, Ch. 146, which enacts that when any United States legal-tender notes may be redeemed or received into the treasury and shall belong to the United States, they shall be reissued and paid out again and kept in circulation, notes so reissued are legal tender."[2]

The men who framed the Constitution undoubtedly supposed they were making irredeemable paper money, issued by the government, impossible. Mr. Madison said the Convention "had cut off the pretext for a paper currency, and particularly for making the bills a legal tender, either for public or private debts."[3]

354. **Are Treasury Notes Real Money?**—During the suspension of specie payments, the question arose whether these notes were real money. On the one hand, it was said that they had been declared a legal tender, that they as well as coin paid debts, that money is made by the stamp of government, and that they had the stamp. It was replied that real money contains intrinsic value, and that paper money will not long circulate at par unless redeemable in real money, that is, in gold and silver. It was also denied that the government stamp gives money its value. For example, the law authorizing the coinage of the eagle says it shall contain a certain quantity of gold of a certain fineness, and the mint stamp is simply the government's certificate that the eagle actually contains the kind and quality of metal specified. The value of the eagle does not come from the stamp, for it will command the same price when the stamp is effaced. The words "one eagle" mean this is one eagle; while the treasury note of the same denomination is not really ten dollars but a promise to pay ten dollars. Then again, the value of the note depends upon the belief that, sometime, this promise will be kept. The eagle pays a debt forever; the note postpones final payment to some future time. Dr. Andrews has well said: "If the treasury notes in the hands of the people were veritable money, as truly so as gold, then the United States would not be indebted to those who

[1] Legal Tender Cases, 12 Wallace 457.
[2] Juilliard *v.* Greenman, 110 U. S. p. 421.
[3] Elliot, *Debates*, Vol. V., p. 435, Note.

hold them any more than it is to those who have gold eagles in their possession; and the Treasury Department would not report these treasury notes as a part of the national debt."[1]

355. Taxability of National Bonds, Notes, etc.—The great increase of the public debt in 1861-1865 led to the question whether national bonds and notes were taxable. More narrowly, it was whether the States could tax them. The question had been passed upon long before. In 1820 the Supreme Court declared that the States have no power or right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers. The argument was thus stated by Chief-Justice Marshall:

"If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the patent rights; they may tax the papers at the customhouse; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not make this government dependent upon the States."[2]

This reasoning applies to all the fiscal instruments authorized by the national government, either directly or indirectly. However, Congress passed an act, approved August 13, 1894, which provides that circulating notes of the national banks and United States legal tender notes, and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency, and gold, silver, or other coin, shall be subject to taxation as money on hand or on deposit under the laws of every State and Territory, and at the same rate as other money or currency circulating as money within its jurisdiction.

356. Resumption of Specie Payments.—When specie payments were suspended in 1861 the understanding was that they would be resumed as soon as practicable. In 1869 Congress solemnly pledged the faith of the nation to resumption at the earliest period. In 1875 it passed an act directing the Secretary of the Treasury, on and after January 1, 1879, to redeem in coin the treasury notes then outstanding, on their presentation in sums of $5,000 or more at the subtreasury of the United States in New

[1] *New Manual of the Constitution*, p. 116.
[2] McCulloch *v.* Maryland, 4 Wheaton 516.

York. Specie payments were accordingly resumed at that time. However, the treasury notes were not cancelled on redemption, but were still considered as money and reissued in payment of the government expenses, which operated to keep a large amount of them in circulation. The Act of 1900 provides that all such notes, on presentation to the treasury for redemption, shall be redeemed in standard gold coin, and in order to secure such redemption the Secretary of the Treasury is instructed to set apart and to maintain in the treasury a reserve fund of $150,000,000 in gold coin and bullion to be used for redemption purposes only.

357. **Coinage in the Articles of Confederation.**—The Congress of the Confederation had the exclusive power to regulate the alloy and value of coin, whether struck by its own authority or that of the States, as well as of fixing the standard of weights and measures throughout the United States. This provision was of no practical consequence, however, for, save some copper cents, neither Congress nor the States coined any money. The Convention of 1787 went further and forbade the States to coin money or to make anything but gold and silver coin a legal tender in payment of debts.

358. **Establishment of a Monetary System.**—In 1785 the Old Congress made the dollar, a Spanish coin that then circulated more generally in the United States than any other, called also a "piece of eight," the money unit of the country, and adopted the decimal ratio. In 1792 the New Congress established the mint in Philadelphia. In the same act it provided for gold, silver, and copper coins, assigning them their names, fixed the quantity and fineness of metal that they should contain, and made the gold and silver coins a legal tender in all sums.

359. **Regulating the Value of Money.**—Congress regulates the value of money merely by determining the ratio of one metal to another. If money consisted of but one metal, no regulation would be necessary or possible. Congress in 1792 declared that a gold dollar should contain 24¾ grains

of pure gold, and that a silver dollar should contain fifteen times that amount of pure silver, or 371¼ grains. This was acting on the understanding that one ounce of gold was worth as much as fifteen ounces of silver.

360. **Fineness and Weight of Coins.**—The fineness and weight of our coins have been different at different times. In 1792 the alloy in gold was made one part in 12, or the coin was $\frac{11}{12}$ fine; the alloy in silver was made 179 parts in 1485, that is, the coin was 89.243, or a little less than $\frac{9}{10}$ fine, but since 1837 the standard coins of both metals have been $\frac{9}{10}$ fine. The gold dollar of 1792 weighed 27 grains of standard metal; the silver dollar, 416 grains. Since 1834 the gold dollar has weighed $25\frac{8}{10}$ grains, and since 1837 the silver dollar, 412½ grains. The amount of pure silver in the dollar has been the same throughout; but since 1853 a dollar of fractional silver currency has contained only $347\frac{2}{10}\frac{5}{0}$ grains of pure metal, or $385\frac{5}{10}$ of standard metal.

361. **Change of Ratio.**—It was found in time that gold was undervalued as compared with silver. The result was, that gold coins struck at the mint were sent to other countries where they commanded a higher price. So Congress in 1834 reduced the amount of pure metal in the gold dollar to $23\frac{2}{10}$ grains, and, as the silver dollar was not changed, the ratio now stood 1 to 15.988. And that has since remained the ratio. It soon appeared, however, that silver was now undervalued; the ratio in the mints of Europe was but 1 to 15½. To make the matter worse, silver continued to rise in value as compared with gold, particularly after the discovery of gold in California and Australia. Silver coin was now exported as gold had been before, and little coin but gold was in circulation. There was a lack of small coins for change. Congress corrected this evil in 1853, by so reducing the quantity of metal in the minor silver coins that there was no longer a motive for sending them abroad. At the same time their legal tender power was limited to $5.00.

362. **Demonetization of Silver.**—As we have seen, silver

coin nearly ceased to circulate after 1834. Practically, the 412½ grain dollar was demonetized after that year. For this reason, and also because the foremost commercial nations made gold their sole monetary standard, Congress in 1873 dropped that dollar from the list of coins to be struck at the mint. At the same time Congress authorized the trade dollar, weight 420 grains of standard silver. The trade dollars were coined for the Chinese trade, and when enough of them had been struck for that purpose their further coinage was suspended. They have now been called into the treasury.

363. Silver Act of 1878.—Previous to 1873 the metal in a silver dollar had been worth, at different times, from 2 to 4¼ cents more than the metal in a gold dollar. In 1873 it was worth $\frac{4}{10}$ of a cent more. But soon after the coinage act of that year went into operation, silver began to fall in value, and it continued to fall until it was worth but 75 cents in 1887, and but 40 cents in 1903. There soon sprang up a popular demand for the recoinage of the silver dollar. In 1878 Congress passed an act restoring it to the list of authorized coins, at its old weight and fineness, and required the Secretary of the Treasury to purchase silver bullion at the current price and to coin it into dollars, not less than $2,000,000 nor more than $4,000,000 a month. The minor silver coins when presented in sums of $20 or more were made redeemable in legal tender money.

364. Silver Act of 1890.—The law of 1878 not proving satisfactory to the advocates of an enlarged use of silver, Congress enacted in 1890 a new one embracing the following features:

The Secretary of the Treasury was required to purchase 4,500,000 ounces of silver bullion each month, or so much thereof as might be offered, at the market price, not exceeding one dollar for 371.25 grains of pure silver. This silver he should pay for with treasury notes, issued expressly for this purpose, which should be a legal tender in all contracts except when the contrary was stipulated, and also receivable for customs, taxes, and public dues. These notes the Secretary should redeem in gold or silver coin like other legal tender notes. The Secretary was required to coin 2,000,000 ounces of the silver that he purchased each month, until July 1, 1891; after that date, only so much as might be necessary to redeem the notes issued for its purchase. The provisions of the law of 1878 in regard to the coinage of silver were repealed; but the law declared it to be the policy of the government to maintain the two metals upon a parity at the existing ratio, or some other one to be fixed by Congress.

365. **Acts of 1893, 1898, and 1900.**—At a special session of the Fifty-third Congress, convoked to consider the financial state of the country and government, an act was passed after a long and severe struggle, repealing so much of the act of 1890 as directed the Secretary of the Treasury to purchase from time to time silver bullion on account of the government. This act, which bears date November 1, 1893, declares it "to be the policy of the United States to continue the use of both gold and silver as standard money," and to coin both metals into money of equal value, such equality to be secured by international agreement or by such legislation as would insure the parity of the coins of the two metals at all times, in the markets and in the payment of debts.

The Act of June, 1898, authorized and directed the Secretary of the Treasury to coin in standard silver dollars as rapidly as the public interests might require, to an amount, however, of not less than one and a half million dollars in each month, all of the silver bullion then in the treasury, purchased in accordance with the provisions of the Act of 1890, said dollars, when so coined, to be used and applied in the manner and for the purposes named in said act.

The act of 1900 declares that the dollar consisting of 25.8 grains of gold, nine tenths fine, as established by law, shall be the unit of value, and that all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard. The act does not affect the legal tender quality of the silver dollar, or any other money coined or issued by the United States, as previously provided by law. Furthermore, the act does not preclude the accomplishment of bimetallism, whenever conditions shall make it expedient and practicable to secure the same by concurrent action of the leading commercial nations of the world.

366. **The Mints.**—Besides the mint in Philadelphia, there are now other mints at New Orleans, Carson City, San Francisco, and Denver. There are also assay offices in New York, Seattle, Helena, Boise, St. Louis, Charlotte, and Deadwood. The Coinage Act of 1873 created the Bureau of the Mint in the Treasury Department, with a Director at its head. Each mint is managed by a superintendent who reports to the Director. The mint mark on coins is the letter or letters showing at what mint they were struck. Thus, "S" San Francisco, "C C" Carson City.

367. **Gold and Silver Certificates.**—The Secretary of the Treasury is directed to receive deposits of gold coin in sums of not less than $20 and to issue gold certificates therefor in denominations of

not less than $20, which coin he shall retain in the treasury for the payment of such certificates, and for no other purpose. Such certificates are receivable for customs, taxes, and all other public dues, and when so received may be reissued. He is also directed to issue for silver coin deposited in the treasury silver certificates of denominations of $10 and under, except that he may, at his discretion, issue such certificates in denominations of $20, $50, and $100 to an amount not exceeding ten per cent of the total so issued. Treasury notes were issued in large quantities to pay for silver purchased under the Acts of 1878 and 1890, but most of them have been redeemed.

368. **Banks of the United States.**—In 1791 Congress chartered a Bank of the United States, with a capital of $10,000,000, for twenty years. The objects sought were the creation of a fiscal agent through which the government could transact its business, that would purchase a certain number and value of the public securities, and that would loan money to the government in case of emergency, thus strengthening the public credit. The establishment of this bank was one of the great financial measures of Alexander Hamilton, then Secretary of the Treasury. It was strongly opposed by the nascent Republican party, under the lead of Jefferson. In 1811 adverse influences were in the ascendant, and the bank's charter was not renewed. In 1816 Congress chartered a second Bank of the United States for reasons like those which prevailed in 1791, with a capital of $35,000,000, also for twenty years. The constitutionality of both these banks was denied. The Supreme Court affirmed it of the second one in 1820,[1] but in 1832 President Jackson vetoed a bill rechartering it; two years later he directed the Secretary of the Treasury to remove the government deposits from its keeping; and in 1836 its charter expired and was not renewed. When the Whigs came into power in 1841 they passed a bill through Congress rechartering the bank, but President Tyler vetoed it, and, after a period of discussion, the subject passed out of the public mind. Both of these banks had the seat of their operations at Philadelphia, and both established branches in various

[1] McCulloch *v.* the State of Maryland, 4 Wheaton, 316.

cities; the government was a stockholder in both, and appointed a certain number of the directors.

369. State Banks.—Banks chartered by States have existed since the beginning of the government, and many of them formerly issued bills or notes that circulated as money. The constitutionality of State banks of issue has often been questioned; but in 1837 the Supreme Court decided that, so long as there is no attempt to make these notes a legal tender in payment of debts, they are not in conflict with the Constitution. In part the question is whether such notes are bills of credit in the sense of the Constitution. The court said: "If the legislature of a State attempts to make notes of any bank a tender, the act will be unconstitutional."[1] After the downfall of the Bank of the United States in 1837, notes of State banks formed for the most part the currency of the country. Some States created good banking systems, but more created poor ones. Only a minority of the banks redeemed their bills in coin, and the people suffered enormous losses from the partial or total worthlessness of bank paper. In 1861 the State banks numbered 1,601, with a capital of $409,000,000; there were more than 10,000 different kinds of notes in circulation, issued by the authority of 34 different States, under more than 40 different statutes.[2] In December, 1861, all banks suspended specie payments.

In 1866 Congress imposed a tax of ten per cent on the circulation of State banks; and, as they could not pay this tax from the profits of their circulation, they were compelled to retire from business as banks of circulation, or to reorganize as national banks. The Supreme Court has affirmed the constitutionality of the tax.[3]

370. First Fiscal Agents of the Government.—The government employed the Banks of the United States as fiscal agents, depositing its funds in them and drawing out its funds on warrants as they were needed. The charters of both banks compelled the government to receive their notes in payment for debts due to the treasury as long

[1] Briscoe *v.* the Bank of the Commonwealth of Kentucky, 11 Peters, 257.
[2] Knox, "Banking," in Lalor's *Cyclopædia*.
[3] Veazie Bank *v.* Fenno, 8 Wallace, 533.

as they were paid in coin. In the interval between the two banks, 1811-1817, the government used the State banks as depositories, and again resorted to them in 1834 when the Secretary of the Treasury withdrew the deposits from the Bank of the United States. All this time the government had no proper treasury, but conducted its monetary operations through the banks.

371. **The Independent Treasury.**—On July 4, 1840, President Van Buren signed an act which created what is known in our history as the subtreasury system. This act provided that rooms, vaults and safes should be built for the keeping of the public funds, that assistant treasurers should be appointed in four principal cities, that the mint and branch mints should be places of deposit, and that after June 30, 1842, all payments made by or to the government should be made in gold and silver coin. This legislation was repealed in 1841, but was reënacted in 1846, and, with modifications, has continued in force until the present time. Besides the treasury in the Treasury Building at Washington, there are now subtreasuries in New York, Boston, Philadelphia, Baltimore, Cincinnati, Chicago, St. Louis, San Francisco, and New Orleans.

372. **Creation of the National Banking System.**—The burdens of war at length compelled Congress to use the power delegated to it to regulate banks of issue on a national scale. By two acts, bearing the dates February 25, 1863, and June 3, 1864, it created a system of national banks, which, with numerous modifications, is still in operation. The objects sought in the new system were to provide a uniform national currency for the country that should be convertible into legal money, to make a market for the national securities, and to create fiscal agents that would at once assist the government in the transaction of fiscal business and also strengthen the public credit. All of these objects the new system accomplished. It is impossible to give, even in outline, the history of the national banking system, but its principal features, as the system was left by the Act of March 14, 1900, will be described.

373. **Features of the National Banks.**—The law creates in the Treasury Department in Washington an office called the Office of the Comptroller of the Currency, and places the general supervision of the whole system in the hands of the incumbent. The banks are required to redeem their

notes in legal money on presentation at their own counters, and also to maintain a fund for their redemption by the United States treasury; and to secure such redemption, thus protecting the note-holder against all possible loss, they must deposit in the office of the Comptroller of the Currency, in pledge for the circulation, bonds of the national government. The comptroller prints the notes in blank, in denominations of $5 and upwards, and delivers them to the banks in amount equal to the par value of the bonds so deposited; but he is authorized to require of the banks additional deposits of bonds or lawful money in case the market value of the bonds held by him shall fall below the par value of the circulating notes outstanding at any time. He shall not deliver to any bank such blank notes in excess of the amount of its capital stock actually paid in, and no bank shall receive or put in circulation more than one third in amount of its circulating notes of the denomination of $5. When a bank's circulation is secured by a deposit of two per cent bonds, it is subject to a tax of one fourth of one per cent, and when by a deposit of bonds bearing a higher rate of interest, to a tax of one half of one per cent on its circulation payable semi-annually; such tax being intended to pay the cost of printing the notes and other expenses incurred on account of the bank business by the treasury. With the approval of the Secretary of the Treasury, banks with a capital of not less than $25,000 may be organized in places having not more than 3,000 inhabitants, and with a capital of not less than $50,000 in places with not more than 6,000 inhabitants. With these exceptions, no national bank shall be organized with a capital of less than $100,000, while in cities of more than 50,000 inhabitants a capital of not less than $200,000 is required. Still more, the government itself practically guarantees the circulation of the banks, and receives their notes in payment of all debts due to the treasury except customs duties. There is a special corps of national bank examiners who examine the banks at stated times and on special occasions. At one time

the aggregate national bank note capital was limited to $354,000,000, which was divided among the States and Territories according to their wealth and population; but this restriction was long ago removed. The banks may charge the rate of interest that is legal in the State where they exist and do business. They are used by the government to some extent as depositories of government funds, and they have acted as agents for other fiscal purposes, such as selling government bonds.

On September 9, 1903, there were in existence 5,042 national banks, having an aggregate capital paid in of $753,722,658. The individual deposits in these banks were $3,156,333,499, their loans and discounts $3,481,446,772, and their outstanding notes $375,037,815. From the organization of the system to the date given about 400 banks had failed, but no bill-holder has ever lost a penny in consequence.

On June 1, 1904, the general stock of money was as follows:

Gold coin, including bullion in the treasury	$1,313,120,868
Standard silver dollars	559,422,410
Subsidiary silver coin	106,614,930
Treasury notes of 1890	13,473,000
United States notes	346,681,016
National Bank notes	445,988,565
Total	$ 2,785,300,789

The money in actual circulation was $2,509,279,917. Estimating the population at 81,752,000, we have an average circulation of $30.69 per capita.

III. Commerce.

Section 8, Clause 3.— To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

374. Power to Regulate Commerce.—Without this clause, the Constitution never could have been ratified, or even framed. The Constitution was "the child of pressing commercial necessity; unity and identity of commerce was its seminal principle;" "in matters of trade, we were no longer to be European, Virginia, Pennsylvania, or Massachusetts men; we were to have but one commerce, and that the commerce of the United States." No clause of the Constitution has more fully justified the expectations of its authors.

"In the practice of the government the commercial power has been applied to embargoes, non-intercourse, navigation, importation, coasting trade, fisheries, seamen, privileges of American and foreign ships, quarantine, pilotage, wrecks, lighthouses, buoys, beacons; obstructions in bays, sounds, rivers, and creeks, inroads of the ocean, and many other kindred subjects; and doubtless includes salvage, policies of insurance, bills of exchange, and all maritime contracts, and the designation of ports of entry and delivery."[1]

375. **The Embargo and Non-Importation Acts.**—Early in the nineteenth century the United States were involved in difficulties with England and France. To bring England to terms, an act forbidding the importation of certain goods from England and her colonies was enacted in 1806. This proving ineffectual, an embargo was laid in 1807 on all vessels bound to a foreign port, within the jurisdiction of the United States, thus confining them, after the act took effect, to the ports where they lay until the embargo should be raised. This act was repealed in 1809, and a non-importation act forbidding commercial intercourse with Great Britain and France was enacted. Still later there was other similar legislation.

The assumption on which these acts rested was that American trade was so valuable to those countries that, rather than lose it, they would yield to our demands. But this they did not do. The Embargo Act was opposed by the commercial classes generally, and particularly by New England. They said a perpetual embargo destroyed commerce, and asked whether a power to regulate was a power to destroy. The issue was carried to the Supreme Court, where the act was declared constitutional.[2]

376. **The Interstate Commerce Commission.**—The extension over the country of the present gigantic transportation system for passengers and freight, was followed by serious evils. To remedy some of these evils, Congress passed an act entitled, "An act to Regulate Commerce," approved Feb. 4, 1887. Some of the principal ends to be accomplished were these: to prevent unfair discrimination in the transportation facilities offered to persons and places;

[1] Farrar, *Manual of the Constitution*, p. 328.
[2] Gibbons *v.* Ogden, 9 Wheaton, 1.

to prevent the giving of passes to persons supposed to possess influence valuable to the railroads; to prevent unfair discrimination in passenger fares as between different places, and in freight charges, either in the form of special rates or in the form of rebates, and to require all charges to be an open and public matter. The law created the Interstate Commerce Commission, charging it with the duty of enforcing the provisions of the law. The members of this commission are appointed by the President and the Senate, and receive salaries of $7,500 each. The principal office of the commission is in Washington, where most of its sessions are held.

377. **Anti-Trust Act.**—An act was approved July 2, 1890, the purpose of which was to protect trade and commerce against unlawful restraints and monopolies, which is popularly known as the Anti-Trust Act. It declares every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, illegal. Persons entering into such contracts, or engaged in such combinations, are pronounced guilty of a misdemeanor, and on conviction thereof are made amenable to punishment by fine and imprisonment. Persons monopolizing or attempting to monopolize, combining or conspiring with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, are declared guilty of the same offense and subject to the same penalties. The word person or persons here includes corporations and associations existing under law, whether foreign or domestic, State or National. The Circuit Courts are vested with jurisdiction over such cases. As in the case of the Interstate Commerce Act, nothing is said about commerce that is carried on exclusively within a State.

In 1903 Congress created the Bureau of Corporations and gave it power to investigate the organization and working of any trust or corporation engaged in interstate or foreign commerce, except transportation companies.

378. The Original-Package Decision.—Some of the States having passed laws prohibiting the sale of intoxicating liquors, save for certain specified purposes, as mechanical and medicinal uses, the Supreme Court held, April 28, 1890, in a decision[1] that is popularly known as the original-package decision, that such laws are unconstitutional, null, and void in so far as they apply to the sale by an importer, in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from any other State. This decision was based on the ground that such laws in this feature are repugnant to the clause of the Constitution granting to Congress the power to regulate commerce among the States.

To meet this decision, Congress enacted a law providing that all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining for use, consumption, sale, or storage therein, shall, upon arrival, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent, and in the same manner, as though such liquids and liquors had been produced in it, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This law the court has since pronounced constitutional, and the court also held that it is not necessary for the States to reënact the laws already upon their statute books.[2]

379. Police Power of the States.—The last three topics, and particularly the matter of original packages, touch a constitutional question of great practical interest. While the power of Congress over commerce between the States is unlimited, it has no such power whatever within the States; there the State jurisdiction is supreme. Moreover, the State exercises the power known as public police, by which it seeks "to preserve public order, and to prevent offenses against the State"; "to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others."[3] Naturally, in a society of such great extent as the United States, which is constantly increasing in complexity of interests growing out of multiplying social relations, it is found difficult to adjust interstate commerce both to State commerce and to the necessities of public police. The topic will be touched upon again in dealing with State inspection laws; but it should be remarked in this place that to adjust the

[1] Leisy *v.* Harden, 113 U. S., 100.
[2] Cooley, *Constitutional Limitations*, p. 704.
[3] *In re* Rahrer, petitioner, 140 U. S., 545.

delicate controversies arising between the National authority and the State authority, has severely taxed the powers both of Congress and of the courts.

380. **Navigation and Tonnage.**—Of the many regulations concerning navigation and tonnage enacted by Congress, a few only need be noted: (1) No American citizen can, by purchasing a foreign-built ship, make her an American ship, entitled to carry the flag of the country; (2) an American ship ceases to be American if owned, in whole or in part, by a citizen, native-born or naturalized, who usually resides abroad, unless he be a consul or a representative of an American mercantile house; (3) no ship can be registered as an American vessel of which a foreigner owns any part; (4) no vessel owned, in whole or in part, by citizens of foreign countries can engage in the carrying trade between American ports; (5) every vessel arriving at an American port from a foreign country (with some exceptions) must pay a tonnage tax of three or six cents a ton on her carrying capacity.

IV. Naturalization and Bankruptcy.

Section 8, Clause 4.—To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

Amendment XIV., *Section 1.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . .

381. **Terms Defined.**—Citizenship is membership in the body politic or state; a person possessing it is bound to allegiance and is entitled to protection. Naturalization is an act by which the rights, privileges, and duties of the citizen are conferred upon a foreigner or alien.

Naturalization is of two kinds, collective and personal. One mode of collective naturalization is seen in our annexations of foreign territory. In these cases, prior to 1898, all inhabitants of the territories annexed who desired to become such, excluding the native races, were constituted American citizens. Again, Amendment XIV. naturalized the slaves as a body. Personal or individual naturalization is sufficiently explained by the terms themselves. The Constitution is silent concerning collective naturalization; that power belongs to the nation as a sovereign state.

382. **State Control.**—The naturalization policy that England had pursued in the colonies was very illiberal, and their growth by immigration was retarded in consequence. So they passed natural-

ization laws of their own. One of the charges made against George III. in the Declaration of Independence was that he had endeavored to prevent the population of the States, and for that purpose had obstructed their naturalization laws and refused to pass others to encourage immigration. With independence, the undisputed control of the subject passed into the hands of the States. The only case in which the Old Congress appears to have touched it, was in June, 1776, when it said: "That persons abiding in any of the United Colonies, and desiring protection from the laws of the same, owe allegiance to the said laws, and are members of such colony." The Articles of Confederation made the citizens of one State the citizens of all the States. This was wise, but the different States made different rules of naturalization, and this led to confusion and difficulties that continually increased. Hence the full control of naturalization was given to Congress.

383. Naturalization Laws.—The naturalization policy of the colonies, and afterwards of the States, was liberal. They invited foreigners to come and improve their boundless resources. In 1790 Congress enacted a naturalization law; and since then twenty or more laws relating to the subject have been passed, most of them of a liberal character. The period of residence necessary to naturalization was made two years in 1790, five years in 1795, and fourteen years in 1798. Since 1802 it has been five years.

384. Process of Naturalization.—The steps to be taken by an alien in order to become a citizen of the United States are these:

1. At least two years before his admission to citizenship, the applicant must declare on oath, before some court of record having the necessary jurisdiction, that it is his *bona fide* intention to become a citizen. The clerk of the court records this declaration, and gives him a certificate stating that it has been made.

2. After the expiration of the two years, the applicant must prove to a court having competent jurisdiction, by one or more witnesses, that he has resided in the United States at least five years, and in the State or Territory where the court is held at least one year; that he has behaved as a man of good moral character, is attached to the principles

of the Constitution of the United States, and is well disposed to the good order and happiness of the same.

3. He must swear that he will support the Constitution, and that he absolutely renounces all allegiance to any foreign prince or state, and particularly the one of which he was a subject, and also any title of nobility that he may have held.

4. Record is made of these proceedings, and the applicant receives a certificate stating that he has complied with the demands of the law, and is a citizen of the United States. His wife and children under twenty-one years of age also become citizens. If a man die after having made his declaration and before his naturalization is completed, his widow and minor children can become citizens on taking the necessary oaths.

Previous to 1870, only white persons could be naturalized. An act of that year extended the privilege to aliens of African nativity and persons of African descent. A more recent law denies naturalization to the Chinese, Japanese, and others of the Mongolian race-group. Only free white persons and African negroes are admitted to naturalization in the United States.

385. States May Confer Political Rights.—At first some of the States supposed that they had concurrent jurisdiction with Congress over naturalization, but in 1817 the Supreme Court decided that the jurisdiction of Congress is exclusive.[1] But while a State cannot make an alien a citizen, it can grant him civil and political rights within its own jurisdiction that do not conflict with the National laws. This many of the States, and particularly the new ones, do; by allowing aliens to own land, to vote, etc., such States have greatly promoted their settlement and growth.[2]

---

[1] Chirac *v.* Chirac, 2 Wheaton, 259.

[2] The question, Can a man renounce his allegiance to the state of which he is born a subject or citizen? has often disturbed the relations of the United States with other powers. Formerly nations did not admit the right of expatriation, at least without the consent of the sovereign. Once a subject, always a subject. The assertion of this claim by England in impressing naturalized American seamen, once British subjects, was the principal cause of the war of 1812. In 1868 Congress declared that expatriation is a "natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," and this doctrine is now pretty generally received. England finally conceded the principle in a treaty with the United States entered into in 1870.

386. **Bankruptcies.**—Just what the Federal Convention meant by laws on the subject of bankruptcies, has been disputed. The commonly received view is that an insolvent person, or one unable to pay his debts, is a bankrupt, and that a law dividing his property proportionally among his creditors and discharging him from legal obligation to make further payment is a bankrupt law.[1] Congress has passed four such laws. The first one was in force from 1800 to 1803; the second, from 1841 to 1843; the third, from 1867 to 1878; the fourth was enacted in 1898, and is now in force. The later laws have recognized voluntary and involuntary bankruptcy. At present, any person who owes debts, except a corporation, is entitled to the benefit of the act as a voluntary bankrupt; while any natural person owing debts to the amount of $1,000, with a few exceptions, may be adjudged an involuntary bankrupt. The District Courts of the United States, in the several States and Territories, administer the law as courts in bankruptcy through referees whom they appoint for the purpose.

The States may enact insolvent laws that have somewhat the same effect as bankrupt laws. These laws are limited in their operation to the State making them, and they are always subordinate to the national bankrupt law, if there be one in force. Insolvent laws never apply to debts existing when they are passed, but are always prospective in their operation. This is because a State cannot pass a law impairing the obligation of contracts. This rule does not apply to Congress, and the four bankrupt laws that it has enacted have been retroactive.[2]

V. Weights and Measures.

Section 8, Clause 5.—To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

---

[1] See Sturgis *v.* Crowninshield, 4 Wheaton, 122.

[2] It is generally held in commercial societies, and especially after commercial crises, that judiciously framed bankrupt laws are useful. They clear the channels of commerce of wrecks. The discharged bankrupt is still under moral obligation, if possible, to pay his debts in full. In the nature of the case, bankrupt laws are very liable to abuse; still most European countries have permanent ones that are far more stringent than ours have ever been. It has been strongly urged that a system of such laws should be a permanent part of the national legislation.

387. Value of Uniformity.—Uniformity of weights and measures is only less important than uniformity of money, and the Federal Convention wisely committed it to the same authority. Still, although President Washington urged the subject upon the attention of the First Congress, and John Quincy Adams, as Secretary of State, discussed it in an elaborate report in 1821, Congress was very slow to exercise the power that this clause confers.

The colonies used the English weights and measures, but in time divergences appeared. Mr. Adams reported that, in 1821, considerable discrepancies existed in the customhouses within the several States, and often in the same State, in all measures of weight and capacity. In 1828 Congress made the English brass troy pound the standard troy pound at the national mint. Afterwards accurate copies of the received standards of weights and measures were supplied to the various customhouses. In 1836 Congress directed the Secretary of the Treasury to deliver a complete set of all the weights and measures adopted as standards to the governors of the several States for the use of the States. The other standards, the imperial yard, 36 inches, the imperial avoirdupois pound, 7,000 grains, and the wine gallon, 231 cubic inches, have never been adopted by statute but rest upon use and tradition. The power given to Congress in the case of weights and measures is not, as in the case of money, forbidden to the States. When States have legislated on the subject, they have adopted the National standards. In 1866 Congress legalized the metric system, and in 1873 and in 1876 it voted money for furnishing metric standards for the States. In 1866 the Postmaster-General was directed to furnish metric balances to postoffices exchanging mails with foreign countries. In 1901 Congress passed an act to establish a National Bureau of Standards.

VI. Counterfeiting.

Section 8, Clause 6.— To provide for the punishment of counterfeiting the securities and current coin of the United States.

388. Need of the Power to Punish Counterfeiting.— The States, if they wish, may punish counterfeiting the National securities and coin. In the case of coin, the Supreme Court has distinctly affirmed that they have the right.[1] But, manifestly, it would not answer to trust solely to them. The securities and coin are national instruments

[1] The U. S. *v.* Marigold, 9 Howard 560.

of government; and, if the nation is going to protect its instruments of government, without which it would not be a nation, it must protect them.

389. **Counterfeiting Defined.**—The word counterfeiting is used in a general and in a special sense. In the Constitution, according to Professor Pomeroy, "it embraces not only the manufacture of forged coins and securities [or counterfeiting proper], but the uttering them when made, and the having them in possession with intent to utter them. Congress may, therefore, pass laws determining each of these three grades of crime,—the manufacture, the putting into circulation, and the having in possession with the intent to put into circulation; and may fix such penalties and punishments to each offense as it deems expedient." [1]

390. **Punishment of Counterfeiting.**—Any person guilty of any one of these crimes in respect to gold or silver coins, or bars stamped or coined at the mints and assay offices of the United States, is punishable by a fine of not more than $5,000, and by imprisonment at hard labor for not more than ten years. "Obligation," or "security," the law declares to mean "all bonds, certificates of indebtedness, national currency, certificates of deposit, bills, checks, or drafts for money drawn by or upon authorized officers of the United States, stamps, and other representatives of value, of whatever denomination, which have been, or may be, issued under any act of Congress." Counterfeiting the notes of the national banks, and passing or attempting to pass such notes with a knowledge that they are spurious, is forbidden under a penalty of not less than five nor more than fifteen years' imprisonment, and a fine of not more than $5,000. Minor coins, letters-patent, certificates of entry at the customhouse, land warrants, money orders, postal cards, and stamped envelopes are also protected. Counterfeiting within the United States the coin, notes, bonds, etc., of foreign governments is also prohibited under severe penalties.

[1] *Constitutional Law*, p. 358.

VII. Post Offices.

Section 8, Clause 7.— To establish post offices and post roads.

391. **General Post Office.**—The Articles of Confederation gave to Congress the right to regulate the post office from one State to another, and the Constitution gave it power over the whole subject. In fact, this is a function that the States did not at any time claim. It has often been proposed that the national government should assume control of the telegraphs as well as the mails, as has been done by most of the governments of Europe.

392. **Kinds of Post Offices.**—Post offices are divided into four classes; the first three include those whose incumbents receive a compensation of $1,000 or more a year, and the fourth those whose incumbents receive less than that amount. The incumbents of the first three classes, sometimes called presidential postmasters because they are appointed by the President and Senate, receive regular salaries ranging from one to six thousand dollars. Fourth-class postmasters are appointed by the Postmaster-General, and receive a percentage on the income of the office. Presidential postmasters are appointed for four years; the others hold their offices at the pleasure of the Postmaster-General. Offices are divided into these classes with reference to their incomes.

393. **Miscellaneous Provisions.**—To insure the greater security of valuable letters, the department registers them and gives special attention to their transfer, charging a fee of eight cents therefor. The law authorizes the Postmaster-General to establish a system of free mail delivery in towns with an annual gross postal revenue of $10,000. Provision is made for the immediate delivery of letters in towns of 4,000 inhabitants and upwards, if they bear a special ten-cent stamp. Mail is also delivered on many thousands of rural free delivery routes. There are four classes of domestic mail matter, bearing different rates of postage.

1. Letters, postal cards, and other written matter, and all matter closed to inspection. The rate, save on postal cards and drop letters mailed at non-delivery offices, which is one cent each, is two cents an ounce or fraction of an ounce.

2. Periodicals, magazines, etc. When sent from a registered

publishing office, or a news agency, the rate on this class of matter is one cent a pound; otherwise one cent for every four ounces.

3. Books, author's copy accompanying proof sheets, etc., are charged one cent for two ounces or fraction of the same.

4. Merchandise is charged one cent an ounce.

Money orders are procurable on the payment of a small fee at the more important post offices.

Previous to 1873 the President, Vice President, heads of departments, Senators, and Representatives enjoyed the privilege of receiving and sending mail matter free. In that year this privilege, called the franking privilege, was abolished; but it was partly restored by later acts. Since 1877 the Departments have sent letters and packages relating to government business free, and since 1895 members of Congress have had the same right.

VIII. Copyrights and Patent Rights.

Section 8, Clause 8.— To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

394. Reasons for the Clause.—The protection of authors and inventors in the possession of their works and inventions rests on the common rule that a man is entitled to the rewards of his own labor. Besides, such protection promotes the progress of science and the arts. Copyrights and patent rights were granted by the colonies and States down to 1789, when the power to issue them was vested in Congress.

395. Law of Copyright.—The author, inventor, designer, or proprietor of any book, chart, dramatic or musical composition, engraving, cut, print or photograph, or negative thereof, or of a painting, drawing, chromo, statue, and of models or designs to be perfected as works of the fine arts, upon complying with the terms of the law, has the sole liberty of printing, publishing, and vending the same for the term of twenty-eight years; and then he, if living, or his widow or children, if he be dead, as before, may have the same exclusive right continued for the further term of fourteen years. The right also extends to the performance of dramatic compositions, and to dramatizations and trans-

lations of literary works. The right is limited, however, by the provision that the two copies of the work to be sent to Washington (see below) must be printed from type, plates, negatives, or drawings, set or made in the United States, or from transfers made therefrom. During the period covered, the importation of foreign editions or copies of copyrighted works is strictly forbidden, save in certain specified cases. One person may import for use, but not for sale, subject to duty, not more than two such copies at any one time; but this limitation does not apply to books in other languages than the English. Again, the law provides that copyright shall be extended to a citizen of a foreign state only when such state, by law, treaty, or international agreement, shall extend to American citizens the benefits of copyright on substantially the same basis as to its own citizens.

396. **Steps to be Taken.**—The author or publisher of a copyrighted work must deliver at the office of the Librarian of Congress, at Washington, or mail within the United States, addressed to him, a copy of the title page of the book, map, etc., or of the description of the work of art, on or before the day of publication. He must also deliver or send, as above, two copies of the best edition of the work copyrighted, not later than the day of publication, to be deposited in the Library of Congress. He must pay a fee of one dollar to the Librarian for recording the title or description and furnishing a certificate of the same. Every copy of the work published must bear on the title page, or the following page, the form: "Copyright, 19—, by A. B." A copyright may be sold and transferred like other property, provided due notice is given to the office at Washington.

397. **International Copyright.**—In 1837 Prussia passed a law offering to the authors of any country that would reciprocate, the protection of the Prussian copyright. England followed this example in 1838. Numerous treaties affecting such arrangements have been entered into by various nations. In 1852 France granted the French copyright to foreign authors, without requiring reciprocity. After many attempts to secure the enacting of an international copy-

right law by Congress had been made and failed, the Fifty-first Congress, at its second session, granted to foreign authors the limited copyright set forth above.

398. Patent Rights.—A patent secures to an inventor the exclusive right to manufacture and sell his invention for a period of seventeen years. Once the Commissioner of Patents could in certain cases extend a patent seven years beyond this time, but at present there can be no extension without a special act of Congress for that purpose. The applicant for a patent must (1) take an oath that he believes himself to be the real author of the invention for which he makes his application; (2) file in the Patent Office a description of the invention; (3) pay a fee of $15 on filing his application, and a second fee of $20 on the allowance of the case. Patents on designs run from three to fourteen years, and the fees range from $10 to $30. The questions that the Patent Office asks are two: Whether the invention is meritorious, and whether the applicant is its author. The word "patented," with the date of the patent, must be affixed to every patented article manufactured. Patents can be transferred like copyrights, but notice of the transference must be given at Washington. Previous to 1849 all patents were issued by officers belonging to the State Department.[1]

---

[1] The Patent Office, created in the State Department in 1836, and transferred to the Interior Department in 1849, is one of the most interesting of the government bureaus at Washington. The vast collection of models is an important part of the records of the office, and of the history of invention in the country.

"The patent system has been especially identified with the extraordinary development of the physical resources of the United States. The patent laws have been extended and improved to meet or anticipate the wants of the growing nation, and now, in its more modern form, the patent system may almost be said to be a peculiarly American institution. It is estimated that at present more than two fifths of the world's important inventions originate in the United States. The records of our Patent Office are sought for and studied by the inventors and scientists of every nation, and the wisdom of our advanced patent policy is almost universally admitted. Sir William Thomson said in 1876: 'If Europe does not amend its patent laws, . . . America will speedily become the nursery of important inventions for the world.' No feature of our federal system has proven of greater economic importance than the patent system."—See Lalor's *Cyclopædia*, "Patents and the Patent System."

Section 8, Clause 9.— To constitute tribunals inferior to the Supreme Court.

[This subject is discussed in Chaps. XXXIV. and XXXVI.]

IX. Piracies and Felonies on the High Seas.

Section 8, Clause 10.—To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

399. **Piracies and Felonies.**—"By the law of nations," says Justice Story, "robbing or forcible depredation upon the sea, *animo furandi,* is piracy." Congress has, however, declared several offenses piracy that do not come within this definition, the most notable of which is the slave trade. The punishment of piracy is death. These crimes and offenses relate to navigation and commerce: hence the propriety of giving Congress jurisdiction over them. The law of nations recognizes the United States, but not Virginia or Ohio. The Articles of Confederation gave Congress the exclusive power of appointing courts for the trial of piracies and felonies on the high seas, but they gave no power to define these crimes, or, in fact, to punish them. Still, the Confederation did create such courts. Felonies and offenses against the law of nations do not admit of such precise definition as piracy. In English law, felony is a crime that may be punished with death. A state or nation has an exclusive jurisdiction over the adjacent part or parts of the sea, extending three miles beyond low-water mark; but the main sea or ocean lying beyond such a line is the common highway of nations, and all maritime powers have over it a common jurisdiction. The law of nations is a body of rules and precedents governing nations in their relations with one another, resting on the common consent of the civilized world. It may be called the common law of the seas, so far as it relates to them.

X. Declaration of War.

Section 8, Clause 11.—To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

400. **Power to Declare War.**—A declaration of war is a formal notice given by one nation that is about to wage war against another. Such a notice is not absolutely called for by the usages of nations, but it is common to give one before making war. The power is a high prerogative of sovereignty. In monarchies this power is commonly vested in the crown. This is the case in England; but as the House of Commons controls the public purse, the crown is not apt to issue such a declaration unless assured of the support of that body. The Articles of Confederation authorized Congress to declare war, nine States assenting to the declaration. The Convention of 1787 generally agreed that the power should be lodged in Congress; and yet Mr. Hamilton proposed to lodge it in the Senate, and Mr. Butler in the President.

401. **Use of the Power.**—Congress passed an act in 1812 declaring war against Great Britain. In 1846 it passed an act of which this is the preamble: "Whereas, by the act of the Republic of Mexico, a state of war exists between that government and the United States." War in the full sense of the law of nations can exist only between nations; insurrection or rebellion, or even civil war, is not war in this sense, and there was accordingly no declaration of war against the South in 1861. When the government is attacked by domestic or foreign enemies, it is the President's sworn duty to defend it, and this the laws give him ample power to do. The American Civil War began April 13, 1861; President Lincoln took immediate steps to suppress it, but he did not convoke Congress until July 4, following. On April 25, 1898, Congress passed an act declaring that war existed between the United States and Spain, and had existed since April 21.

402. **Letters of Marque and Reprisal.**—The law of nations authorizes the employment in war of two kinds of armed vessels: public ships of war and privateers. The first are owned, officered, and commissioned by the national authority; the second are owned and officered by private persons, but commissioned by public authority. Such a commission is called *letters of marque and reprisal.* A privateersman's commission insures him and his crew the

treatment of prisoners of war in case they fall into the enemy's hands.

Privateering is subject to gross abuses; often it has degenerated into piracy, and there is a growing opposition to it throughout the civilized world. Letters of marque were first issued to commanders of private land forces. Mark, or march, means boundary, and such a commission authorized the officer to whom it was issued to cross the border and make reprisals on the persons and property of the enemy. But privateering on land is no longer permitted. Captures of prisoners and property in war, within certain limits, are regulated by the law of nations. Still, every nation makes captures the subject of regulation by its own laws, and has its own prize courts. Naturally, the whole subject was committed to Congress.

XI. The Army and the Navy.

Section 8, Clause 12.— To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

Section 8, Clause 13.—To provide and maintain a navy.

Section 8, Clause 14.— To make rules for the government and regulation of the land and naval forces.

403. The Two-Years Provision.—Free States are jealous of standing armies, since the freedom of such States has so often been overthrown by them. The members of the Federal Convention, sharing this feeling to the full, placed the raising and support of armies in the hands of Congress, and then carried their distrust to the point of forbidding appropriations of money for this purpose for more than two years. This rule keeps the army within easy reach of the people. No matter how determined the President or Congress may be to make war, or even to carry on one already begun, or to increase the army, the people, at the next election of Representatives, can regulate the matter. In respect to no other appropriation has the Constitution imposed such a limitation. The usage is to make the army appropriation every year, but in 1863 Congress made it for two years. Navies have never been subject to the same jealousy as armies, and the two-years rule does not apply to the federal navy.

The Articles of Confederation gave Congress power to agree upon the number of land forces, and to make requisitions upon the States for their quotas, which were apportioned among them according to their respective numbers of white inhabitants; but it was left to the States to raise their own quotas. The disastrous results of this system do not need again to be related.

404. Army and Navy.—The Confederation bequeathed to the new government a small army, which has been continued to the present time, and is known in law as the "Military Peace Establishment of the United States." The present law fixes the maximum size of the army at 100,000. The actual size is about 60,000 men and officers. The highest grade has been major general, as a rule; but Washington, Grant, and Sherman bore the higher titles of lieutenant general and general; and the rank of lieutenant general has also been conferred upon Sheridan, Schofield, and others. A General Staff Corps composed of forty-five officers was provided for in 1903. Geographically the army is distributed into eleven departments.

The navy of the Revolution hardly survived that struggle, and the one subsequently created was an adjunct of the army until 1798. Up to 1862 the captaincy was the highest rank. The ranks of commodore, rear admiral, vice admiral, and admiral were created during or at the close of the Civil War; the last two afterwards lapsed, but the title of admiral was revived and conferred upon George Dewey, the hero of Manila. Within a few years, many fine modern war vessels have been added to the navy, until it ranks as one of the great armaments of the world. It is manned by over 25,000 officers and men.

405. Rules and Regulations.—The power to make rules for the land and naval forces naturally goes with power to declare war and to maintain an army and a navy. This is also a part of the plan to keep all matters relating to war under the control of Congress and within the reach of the people. The Rules and Articles of War are 128, and the Articles for the government of the navy 60 in number.

406. The Army in the Civil War.—It was under clauses 12 and 13 that the enormous military and naval forces which restored the Union in 1861-65 were created and maintained. Congress passed

several acts to give them effect. On July 22 and 27, 1861, the President was authorized to accept the services of 1,000,000 volunteers for a period not exceeding three years. On July 17, 1862, the authority of the President over the State militias was increased. On March 3, 1863, Congress passed the Enrollment Act. It included in the national forces all able-bodied male citizens of the United States, and persons of foreign birth who had declared their intention to become citizens, between the ages of 20 and 45 years, with exceptions. It divided the country into districts, and located in each one an enrollment board. All persons so enrolled were declared subject to be called into military service for three years. From the list of those enrolled men were drafted by lot; but a drafted man was allowed to furnish an acceptable substitute, or pay a commutation of $300, and be discharged from further liability under that draft. An act approved February 24, 1864, was still more efficient. The excepted classes were reduced in number; the commutation clause was repealed; and the rule in regard to substitutes made more stringent. On July 4, of the same year, Congress gave the President authority, at his discretion, to call at any time for any number of volunteers for the term of one, two, or three years. These several acts provided pay for soldiers and bounties for volunteers, regulated the quotas of towns, cities, wards, and precincts, and created a vigorous drafting machinery. The strength of the regular army was also increased. During the Civil War the President called for 2,763,670 men; the country furnished 2,859,132, or, reduced to a three years' standard, 2,320,272.[1]

XII. The Militia.

Section 8, Clause 15.— To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

Section 8, Clause 16.— To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

407. Laws Concerning the Militia.—The military force of the United States is divided into two classes: the regular troops, or the standing army, and the militia. The militia are the citizen-soldiers, enrolled and organized for disci-

[1] Phisterer, *Statistical Record of the Armies of the United States*, p. 10.

pline, but called into active service only in cases of emergency. These two clauses give Congress as full control over the militia, for the purposes specified in the first one, as the previous clauses give it over the regular army.

In 1792 Congress passed an act to establish a uniform militia throughout the United States. A more complete law, enacted in 1795, authorized the President, as he might think necessary, to call out the militia for the purposes named in clause 15. It was under the provisions of this law that President Lincoln took the first steps to preserve the Union. The militia law of 1862 directed the enrollment in the militia of every able-bodied male citizen of the respective States who was of the age of 18 and under 45. The President was authorized to provide for the enrollment of the militia, if the States neglected to do so. Practically, however, the matter was left to the States. While in active service, the militia are paid the same as the regular troops and are subject to the same rules. Before 1862 they could not be required to engage in active service more than three months in a year, but the law of that year extended the time to nine months. The law of 1903 divided the militia into the National Guard and the Reserve Militia, and strengthened somewhat the national control.

408. The Militia Called into Service.—In three emergencies the President has found it necessary to call the militia of certain States into active service; in 1794 to enforce the revenue laws and suppress the Whisky Insurrection in western Pennsylvania; in the war of 1812, to repel invasion; and in the Civil War, to suppress insurrection. In the last instance three several calls were made: April 15, 1861, for 75,000 men; August 4, 1862, for 300,000; June 15, 1863, for 100,000.

XIII. The District of Columbia.

Section 8, Clause 17.—To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

409. Power to Establish a Capital.—Before the year 1800 the United States had no proper capital. Congress sat at different places, as circumstances required. Previ-

ous to 1783 Philadelphia was the place of meeting, except when it was threatened by the British troops or was in their possession. In June of that year some mutinous soldiers surrounded the building where Congress was in session, subjecting the body to gross insults, and, as the State authorities did not furnish the needed protection, Congress hastily adjourned to Princeton. Congress often discussed the establishment of a Federal City, and even selected a site on the Delaware, but nothing came of this action. With the foregoing facts fresh in mind, the Federal Convention naturally gave Congress power to establish a seat of government, over which it should have exclusive jurisdiction.

410. **District of Columbia Ceded.**—Maryland, in 1788, and Virginia, in 1789, together offered to cede a Federal District on the Potomac, and Congress, in 1790, after a violent contest, accepted these cessions. Congress merely specified that the district should lie between the mouth of the eastern branch of the Potomac and the mouth of the Connogochegue, leaving the precise location to the President acting through commissioners. The commissioners located and named the district, and gave the new capital its name. Time proved that the part lying on the right bank of the river was an encumbrance rather than an advantage, and in 1846 it was re-ceded to Virginia. The original District of Columbia contained 100 square miles; the present one contains somewhat less than 70.

After 1785 the Old Congress sat in New York, and that city continued the seat of government until 1790, when it was removed to Philadelphia. In 1800 Congress and the executive and judicial departments removed to Washington.

411. **Government of the District.**—The control of Congress over the District is absolute. In 1871 a Territorial government was established, with a governor and a council appointed by the President and Senate, and with a house of delegates and a delegate to Congress elected by the people. This government not proving successful, it was

abolished in 1874. At present the District is governed by a board of three commissioners, two of whom are appointed by the President and Senate for three years; the third is an officer of the Engineers of the army detailed by the President. The commissioners appoint all municipal officers; Congress pays half the expenses of the local government, and the property owners the other half. The ballot is unknown, and the people have no political rights whatever.

412. **Forts, Magazines, etc.**—Congress should have jurisdiction over forts, magazines, shipyards, etc., for the same reason that it should have jurisdiction over the seat of government. Still the States, in ceding jurisdiction of the land that Congress buys for these purposes, commonly reserve the right to serve the processes of their own courts, warrants and the like, in these places. This prevents such places becoming asylums for lawbreakers. These processes are served also in the post offices and customhouses.

XIV. Power to Make Necessary Laws.

Section 8, Clause 18.— To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

413. **Doctrine of Implied Powers.**—It has been fully explained in Chapters XII., XIII., that the federal government is one of delegated and not of inherent powers; also that some of these powers are delegated expressly, or in words, others by implication, or by inference. It was also shown that implied powers are inseparable from a written constitution. Accordingly, it has been held that the clause just quoted is in no way essential to the government. Mr. Hamilton said that the constitutional operation of the government would be just the same if this clause were obliterated as it would be if the clause were repeated in every article; "since it is only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain powers."[1] While such is undoubtedly

[1] *The Federalist*, No. 39.

the fact, it was still fortunate that the Convention inserted the clause in the instrument, so as to remove all doubt on the subject.

414. The Theory Carried into Practice.—From the first, Congress has legislated on the theory of implied powers. It has built lighthouses, improved rivers and harbors, laid embargoes on commerce, established banks, given the people of cities free mail delivery, provided money-order facilities, created mints and assay offices, inspected steamboats, constructed roads, promoted education — has done these and a thousand other things that are not mentioned in the Constitution.

415. Two Schools of Construction.—The extent of the powers of the national government is the great constitutional question of the national history. It has called into existence two schools of politics, Strict-construction and Loose-construction. The founders of these schools were Thomas Jefferson and Alexander Hamilton. The first school have clung to the enumerated powers; the second have emphasized the implied powers. The first give prominence to the States; the second seek to give to the Nation strength and dignity. The first lay stress on Amendment X.; the second on clauses 1 and 18 of section 8, Article I. Clause 1 is sometimes called the "elastic clause" and the "general welfare clause," and it is the great bulwark of the party founded by Hamilton.

416. Limitations of the Two Schools.—It must not be supposed, however, that Strict-constructionists as a body have denied that there are implied powers, or that Loose-constructionists as a body have denied that the States have rights. The question is a relative one, viz.: How far shall the doctrines of State rights or of implied powers be pushed? Each school has tended to exaggerate its chosen principle. Extremists of the one school have belittled the Nation, extremists of the other have belittled the States. Either theory pushed to an extreme destroys the Constitution. Strict-construction thus pressed makes the Union a

rope of sand; Loose-construction, the will of Congress the supreme law of the land. Statesmen and parties have sometimes shifted their principles of construction, owing to political conditions. Strict-constructionists in possession of the government have strongly emphasized implied powers; Loose-constructionists in opposition have emphasized State rights as strongly. Still, the dividing line is distinctly traced in history.

417. **Questions Involving Construction.**—A few of the many questions involving methods of construction may be particularized.

1. In 1791 Mr. Jefferson opposed the first United States Bank on the ground that the Constitution did not authorize such an institution. Hamilton defended it on the ground that it was necessary to create and maintain the public credit, to carry on the fiscal business of the government, and to promote the general welfare. In 1817 the party that Jefferson had founded, chartered the second Bank of the United States for substantially the same reasons that Hamilton had assigned for chartering the first one. The Supreme Court in 1820 declared the bank constitutional, but President Jackson, in 1832, vetoed a bill rechartering it, because, he said, it was unconstitutional. When the present system of national banks was created in 1863, the Democratic party stood on Strict-construction ground, the Republican on Loose-construction ground. The Supreme Court having decided that Congress has jurisdiction over the subject, constitutional objections have practically ceased. This history was in substance repeated in relation to legal tenders.

2. In 1806 Congress made its first appropriation for the Cumberland Road, connecting the Atlantic seaboard with the Mississippi valley and this was the beginning of such improvements made at the expense of the national government. The question of constitutional power was raised, and from 1820 to 1860 internal improvements were a party question. Presidents of the Strict-construction school sometimes vetoed bills for such improvements; the Whig party always favored a liberal policy. At present public improvements can hardly be called a constitutional question; the annual River and Harbor Bill is not a party measure. The constitutional argument in favor of these appropriations has assumed such forms as these: they promote the general welfare; they are necessary to carry out the expressly delegated powers; they contribute to the common defense; Congress may establish post roads and provide for the transportation of troops and munitions of war.

3. In organizing the revenue system of the government, Hamil-

ton recommended that customs duties be so levied as to afford incidental protection to American manufacturers. This recommendation was embodied in laws, and from that time the protective principle has commonly been more or less recognized in revenue legislation. It has been denied that the Constitution gives Congress power to levy duties and other taxes save for revenue purposes; to which it is replied that the general-welfare clause gives all the power that is needed.

4. Mr. Jefferson in 1803 thought the annexation of Louisiana and other foreign territory unconstitutional; history made it necessary, the Supreme Court gave its sanction, the nation acquiesced, and the power has long been admitted without question.

These are but a few of the many questions that could be mentioned under this head. It has been denied that the census, as now organized, is constitutional, since the Constitution merely mentions an enumeration of the people. The Bureau of Education also has encountered constitutional objections.

418. Movement of Political Thought.—This brief review shows that certain questions once discussed in the constitutional forum have been practically removed from that forum, and become simply questions of political expediency. It shows, also, that Loose-construction has made steady progress since the foundation of the government. In fact, the Constitution of to-day is, in practice, a very different instrument from the Constitution of Washington's time. Propositions that would then have been opposed as invasions of State rights, are now accepted, even by Strict-constructionists, as a matter of course. Among the causes of this movement of political thought, these may be mentioned:

Territorial growth and the formation of new States that were, in great degree, the creations of the federal government. When a Loose-construction party has obtained possession of the government, it has carried its ideas into practice, and the Strict-construction party succeeding it, finding that those views have become familiar to the people, have accepted some of them. The exercise of the unlimited war power, especially in the Civil War, has tended enormously to centralize power. Then, the non-political decisions of the national courts have uniformly tended strongly to Loose-construction principles. And finally, social, industrial, and commercial changes have compelled Congress to assume new powers.[1]

---

[1] See Lalor's *Cyclopædia*, "Construction."

CHAPTER XXVI.

THE LIMITATIONS OF THE UNION.

ARTICLE I.

419. Reasons for Limitations.—As we have seen, the government of the United States is one of limited or delegated powers. The first limitation, and the greatest one of all, is the States, to which powers not delegated to the Union are mainly reserved. But implied powers, in the very nature of the case, are matters of opinion or judgment. Hence Congress, in the use of its discretion, might exercise powers that the people did not intend to delegate. Public discussion and the elections would correct such abuses of power in ordinary cases; but there were some points deemed so important by the Federal Convention as to demand safeguards in the form of positive prohibitions. Some of these powers are forbidden merely because they were deemed inexpedient or impolitic; others, because their exercise would lead to injustice and oppression.

Section 9, Clause 1.—The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

420. The Slave Trade.—All the States but North Carolina, South Carolina, and Georgia had prohibited the slave trade before 1787, and a majority of the Convention desired to put Congress in a position to make the prohibition universal. But these three States objected. After no little dissension, the difficulty was adjusted, as above, in the third compromise. The tax permitted was never imposed. In 1794 Congress prohibited the exportation of slaves, and in

1807 it prohibited their importation, the act to take effect January 1, 1808. In 1820 it declared the slave trade piracy.

Section 9, Clause 2.—The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

421. The Habeas Corpus in England.—The writ of *habeas corpus* is one of the most ancient and valuable political institutions of England. Its origin dates from before *Magna Charta.* Kings sometimes strove to restrict its operation, or to ignore it altogether, but these attempts came practically to an end with the Habeas Corpus Act of 1679. For centuries the writ has there been the main safeguard of personal liberty.

Hallam thus explains the ancient operation of the writ: "From earliest records of the English law, no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the Court of the King's Bench a writ of *habeas corpus ad subjiciendum* directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency, remand the party, admit him to bail, or discharge him, according to the nature of the charge."[1]

422. The Operation of the Writ.—A prisoner, or some person for him, makes an application to a judge of competent jurisdiction, alleging that the prisoner is unlawfully confined, reciting the history of the case, and praying that he be set at liberty. The judge, if he thinks the facts call for his interference, issues a writ of *habeas corpus* commanding the officer having the person in custody to produce him in court and to show reason for his detention. If the officer gives a good reason for his action, the judge leaves the prisoner in his hands; if not, the judge discharges him or admits him to bail. The writ is sometimes used to liberate persons confined in hospitals for the insane, and to obtain possession of children who are in the custody of

[1] *Constitutional History of England,* Vol. III., p. 16. (London, 1832).

other persons than the claimants. It takes its name from the words *habeas corpus,* you may have the body, found in the old Latin form.

423. **Cases of Suspension.**—This writ was in full force and vigor in the States when the Constitution was framed. It was considered the high-water mark that personal liberty had reached in the long conflict with kingly power. Naturally therefore the Constitution prescribed that it should not be suspended unless in the gravest emergencies. At such times, when society is disturbed, when officers having prisoners in custody cannot attend to civil business, when it may be impossible to produce the witnesses against the accused, or when it is proper to confine men against whom legal offenses cannot be proved in courts of justice, the writ may be suspended in the name of the public safety.

424. **Who Shall Suspend?**—The common answer to the question is Congress. In fact, however, it has always been done by the President. The first suspension was in April, 1861, when President Lincoln authorized General Scott to disregard the writ on the line of travel between Washington and Philadelphia. In May the suspension was extended to Florida, in July to New York, and in September it was made general in cases of arrest by military authority for disloyal practices. In March, 1863, Congress passed an act of indemnity, legalizing the President's acts in respect to the writ, and authorizing him to suspend it throughout the United States, or in any part thereof, whenever, in his judgment, the public safety might require it. In September, 1863, the President made such a suspension throughout the country, in the case of deserters and of persons resisting the draft or accused of offenses against the military or naval service. The war over, the suspension was gradually withdrawn, but it was not until August, 1866, that the privilege of the writ was restored in Texas.

425. **Military Arrests in the Civil War.**—A great number of military arrests were made in the course of this war. Citizen prisoners to the number of 38,000 were reported to the Provost Marshal's office in Washington. Chief-Justice Taney, as well as State judges, issued

writs of *habeas corpus* in the interest of some of them, but the federal officers to whom they were directed refused to obey them. A few of the prisoners were tried by court-martial, but most of them were in time discharged without trial. On the one hand, it was denied that the suspension of the writ was constitutional, and affirmed that many arrests were made without reason; on the other hand, it was said that the nation was engaged in a tremendous war, calling for all its energies, that many persons not in the military or naval service were secretly or openly giving aid and comfort to the enemy, and that the government must use summary and vigorous means in self-defense.

426. The Milligan Case.—In October, 1864, a court-martial, sitting in Indianapolis sentenced several citizens of Indiana to death for treasonable practices. The President commuted the sentence to imprisonment for life, and the prisoners were sent to the Ohio penitentiary. In December, 1866, the case of these prisoners, known as the Milligan Case, from the principal actor, came before the Supreme Court. The court set the prisoners at liberty, and overturned the whole legal theory underlying their arrest and trial. The court held that "martial rule can never exist where the courts are open, and in the proper and unobstructive exercise of their jurisdiction";[1] also, that "the suspension of the writ does not authorize the arrest of any one, but simply denies the one arrested the privilege of this writ in order to obtain his liberty."[1]

Section 9, Clause 3.— No bill of attainder or *ex post facto* law shall be passed.

427. A Bill of Attainder.—Mr. Justice Field, delivering a decision of the Supreme Court, gives this definition: "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evi-

[1] *Ex Parte* Milligan, 4 Wallace 2.

dence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense. . . . These bills are generally directed against individuals by name; but they may be directed against a whole class." [1]

Evidently bills of attainder may be made terrible instruments of cruelty and oppression. Once kings of England frequently obtained their passage in the name of the public safety, in order to crush their enemies, but since 1796 no such bill has passed Parliament. Bills of attainder, or what amounted to the same thing, were much employed in the Revolution to punish the adherents of the royal cause; but the Convention of 1787 considered it necessary to put so dangerous a power beyond the reach of either Congress or the States, and so prohibited it to Congress in the above clause, and to the States in section 10, clause 1.

428. Ex Post Facto Laws.—"An *ex post facto* law," says Chief-Justice Marshall, "is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury." [2] In the United States, the phrase *ex post facto* relates to criminal laws only. Such laws are repugnant to natural reason and feeling.

Section 9, Clause 4.— No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

Section 9, Clause 5.— No tax or duty shall be laid on articles exported from any State.

Section 9, Clause 6.— No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

429. Export Duties.—Clause 5 is an absolute prohibition of taxes on exports levied at the customhouse; but products intended for the foreign market may be taxed by Congress and by the States the same as products intended for the home market. The objection to export duties is that they

[1] Cummings *v.* the State of Missouri, 4 Wallace 277.
[2] Fletcher *v.* Peck, 6 Cranch 138.

increase the price of products and so make it more difficult for exporters to find markets. Still, some of the ablest men in the Convention were opposed to denying Congress this power, on the ground that exports would be a fruitful source of revenue.

430. **Preferences as to Ports.**—The Constitution was framed on the principle that the people of the different States are entitled to equal rights and privileges; and the prohibition of any preference of the ports of one State to those of another sprang from this principle. This is in the same line as the first clause of the previous section requiring all duties, imposts, and excises to be uniform throughout the United States.

431. **Entering and Clearing.**—To enter and to clear are technical terms relating to the customhouse. For a ship to enter is to report her arrival, cargo, etc., to the customhouse authorities; to clear is to obtain from the same authorities the necessary papers giving her leave to sail. All ships arriving from foreign ports must enter, all ships sailing to such ports must clear; but vessels sailing from one American port to another are not obliged to enter, clear, or pay duties in the ports of any State other than that to or from which they may be bound. The first part of the clause limits Congress; the second part, both Congress and the States.

Section 9, Clause 7.—No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

432. **Congress Controls the Treasury.**—This clause is a limitation of the executive department. It puts the expenditure of the public funds in the hands of Congress, just as previous clauses put the raising of funds in its hands. The statement and account of receipts and expenditures are found in the annual reports of the Secretary of the Treasury on the state of the finances.

The ordinary expenses of the government are provided for annually in general appropriation bills, such as the River and Harbor,

Agricultural, Army, Navy, Consular and Diplomatic, Indian, Military Academy, Post-Office, Deficiency, District of Columbia, Fortifications, Legislative, Executive, and Judicial, Pension, and Sundry Civil Bills. In these bills the objects for which the appropriations are made, with the particular amounts, are minutely specified. The Deficiency Bill provides for expenditures not fully met by the regular appropriations of the year before.

Section 9, Clause 8.—No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

433. Titles of Nobility and Presents.—Titles of nobility go with aristocratical and monarchical institutions, and are repugnant to a republican society and government. Mr. Hamilton called their prohibition the corner stone of republicanism. The second prohibition of the clause is intended to prevent foreign states from influencing the officers of our government by giving them gifts and titles. In former times the policy of one nation was sometimes largely controlled by another in this way. English kings once did not disdain to accept largesses from the kings of France. Presents are sometimes made by foreign powers to officers of the United States out of compliment, but they either pass into the custody of the government, or Congress gives those for whom they are intended permission to receive them.

All the above prohibitions relate to national officers merely. In 1809 Congress proposed, but the States did not ratify, the following amendment to the Constitution: "If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever from any emperor, king, prince, or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them."

CHAPTER XXVII.

THE LIMITATIONS OF THE STATES.

Article I.

434. General Reasons.—Duly to limit the States was no less important than duly to limit the Union. In 1787 the States were strong, the Union weak. States had persistently neglected to discharge their duties under the Confederation. Hence it was almost as necessary positively to deny them powers the possession of which was inconsistent with a vigorous general government, as it was to add to the powers of that government.

Section 10, Clause 1.— No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

435. Reasons for these Prohibitions.—If a State could enter into treaties, alliances, and confederations, and grant letters of marque and reprisal, the nation would thereby be drawn into difficulties, and the Union would soon be broken up. The exercise by the States of such powers would make them sovereign States. In fact, nearly all of the powers enumerated in this clause were denied to the States in the Ariticles of Confederation.

436. Bills of Credit.—The Supreme Court has defined bills of credit as "paper issued by the sovereign power containing a pledge of its faith, and designed to circulate as money." Congress and the States issued such money in large quantities in the Revolution; the intolerable evils that these bills produced were fresh in the minds of the men

who framed the Constitution; and, to prevent the recurrence of similar evils, they voted down a proposition authorizing Congress to emit bills of credit, and prohibited the States from issuing them. According to Mr. Madison, the purpose was to give Congress the power to issue bills not having the legal-tender quality, but to prohibit the States absolutely.

For the States to coin money, emit bills of credit, and make anything but gold and silver a tender in payment of debts, would be repugnant to the sovereignty of the Union. Besides, their exercise of these powers would introduce endless confusion into the monetary system of the country, as is well illustrated by the history of the Confederation and of the State banks.

437. The Obligation of a Contract.—Chief-Justice Marshall says a contract is "an agreement in which a party undertakes to do, or not to do, a particular thing." Accordingly, it creates duties and rights between two or more parties. The obligation of a contract is its binding force or sanction upon all the parties concerned. However, this obligation does not arise unless the contract is one that the law sanctions. Thus, a man who agrees to pay money without an equivalent is not bound to pay the money, because such a contract is not binding. A law impairing the obligation of a contract is a law that weakens or destroys its binding force. Two or more men making a contract, do so with reference to the law as it is at the time, and no law should afterward interfere with what they have done.

438. The Dartmouth College Case.—Judge Cooley says no clause of the Constitution has been more prolific of litigation, and given rise to more animated and at times angry controversy than this one in relation to contracts. The best-known case that has arisen under it is the Dartmouth College Case.[1] The New Hampshire legislature materially changed by law the terms and conditions of the charter of Dartmouth College, granted many years before. This law the Supreme Court set aside in 1818, on the ground that the charter was a contract between the State and the college corporation, and that the law impaired it. This decision, which has since been the

[1] 4 Wheaton 518.

great bulwark of vested rights in the United States, has been somewhat modified by recent decisions.

439. **No Prohibition on Congress.**—Congress is not prohibited from impairing contracts, but it was assumed that such prohibition was not necessary. It has been held that the Legal-Tender Acts had that effect. The argument is that contracts requiring the payment of money, existing in 1862-63 when these acts were passed, were made when only gold and silver were legal money; that these contracts called for coin, or its equivalent, to satisfy them; while the acts allowed them to be satisfied with depreciated paper money. Chief-Justice Chase thus reasoned in 1868, but the Supreme Court did not take that view.

440. **The Statute of Limitations.**—The phrase "law impairing the obligation of contracts" is purely technical. It is the business of the courts to declare its meaning, and to adjust it to other parts of our jurisprudence. The Statute of Limitations, which exists in all English-speaking countries, declares that certain rights shall cease if they are not asserted or prosecuted within a certain time. For example, title to land, under these conditions, lapses in twenty-one years. The Supreme Court has decided[1] that such statutes do not impair the obligation of contracts, unless they are made retroactive. A similar decision has been rendered concerning usury laws.

Section 10, Clause 2.— No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

441. **Inspection Laws.**—The great object of inspection laws is to bring certain commodities offered for sale, as meats, flour, oil, and the like, up to a given standard of quality. This is in the interest of both producer and consumer. The inspector examines the commodity, and marks the cask or package. Inspection laws cannot be kept up without expense, and the above clause permits the States, without asking the consent of Congress, to lay such duties on exports and imports, in the form of fees, as may be necessary to defray this expense. But if there is an excess of fees

[1] Sturgis *v.* Crowninshield, 4 Wheaton 122.

collected, over and above defraying such cost, then the States must pay such excess into the national treasury. Moreover, Congress has full power to revise and control all inspection laws. To permit the States to levy taxes upon imports and exports for a wider purpose than to enforce these important laws, would prevent commerce from being national.

442. **Limits of this Power.**—How far the provision in regard to inspection laws extends, is a question that has been often before the Supreme Court. A law of Maryland requiring importers of goods in bales or packages to take out a license, was declared unconstitutional. Chief-Justice Marshall[1] laid down the rule that the right to import goods involves the right to sell them, and that so long as such goods remain in the original packages they are a part of the foreign commerce of the country, and not taxable by the State. But licenses imposed by States on retail liquor dealers are constitutional, even when the liquors sold are imported, such dealers not being importers, or not selling the liquors in bulk.[2] To raise money for the support of marine hospitals, Massachusetts and New York enacted laws levying taxes upon alien passengers arriving in their ports, but the Supreme Court set these laws aside as invasions of the right of Congress to regulate commerce.[3]

Section 10, Clause 3.—No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

443. **Tonnage Duties.**—A duty of tonnage is a tax laid on ships according to their burden or carrying capacity, and is computed by the ton. The States may tax ships belonging to citizens or other persons residing within their borders as other property is taxed, according to their value. The imposition of tonnage duties by States would be plainly inconsistent with the regulation of commerce by Congress; it would soon derange the whole commercial system, and might even throw the country back into the commercial condition that existed before 1789.

---

[1] Brown *v.* Maryland, 12 Wheaton 419.
[2] The License Cases, 5 Howard 504.
[3] The Passenger Cases, 7 Howard 283.

444. State Troops, Ships of War, etc.—The concluding prohibitions of the clause are absolutely essential to the peace and security, and even the existence, of the nation. If the States could keep troops or ships of war in time of peace, enter into agreements or compacts with one another and with foreign powers, and engage in war when not invaded or in imminent danger, the Union would, in a short time, be wholly broken up. Unions would be formed within the Union; State treaties with foreign powers would be made; war would result, and disintegration would surely follow.

445. The States not Sovereign.—It is idle to hold that any body politic is sovereign, in the proper sense of the word, which is denied such powers as entering into treaties and compacts, coining money, emitting bills of credit, laying imposts and tonnage taxes, keeping troops and ships of war in times of peace, and engaging in war.

NOTE.—The difficulty of adjusting the powers of Congress over commerce to the rights of the States, has been remarked in Chapter XXV.

Mr. Desty groups the following points that had been adjusted, with appropriate citations: "Private interest must be made subservient to the general interest of the community, so the power of States over police regulations is supreme. A State law intended as a regulation of police is not a regulation of commerce, but the police power cannot be extended over interstate transportation of the subjects of commerce. A State may regulate the position of vessels in her harbors or rivers, or may regulate the speed of steamers or railroad trains. States may prohibit the introduction of slaves, or exclude paupers, criminals, diseased or infirm persons, and persons afflicted with contagious diseases, and may exact a bond to indemnify from expense of maintaining passengers after arrival; but to exclude passengers who are in possession of their faculties, and neither paupers nor criminals, is a regulation of commerce which the State cannot exercise. So a State cannot legislate to prevent the importation of cattle during certain seasons of the year, this being more than an exercise of its police powers; but it may regulate the introduction of game during certain months; but forbidding the exportation of game, lawfully killed within the State, is unconstitutional. A State may forbid the sale of an illuminating liquid below a certain standard, or regulate the use of explosives and dangerous oils and substances, or may remove the same. The police power extends to the protection of the lives, limbs, health, comfort, morals, and quiet of all persons, and the protection of all property in the State. This clause does not interfere with the rights of States to enact inspection, quarantine, and health laws, as well as laws regulating internal commerce, or commerce local in its character, as requiring the master of a vessel to report the names, ages, and origin of passengers. Inspection laws are not burdens on trade, nor unjust discriminations, so long as they are reasonable; but a statute requiring vessels to furnish statements of the name and owner is void as to United States vessels. So, a statute relating to the survey of sea-going vessels is a regulation of commerce, and void."—*The Constitution of the United States*, p. 72; also, p. 298.

CHAPTER XXVIII.

VESTING THE EXECUTIVE POWER.

ARTICLE II.

Section 1, Clause 1.— The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows.

446. Need of a National Executive.—With the throwing off of allegiance to the British crown, the States ceased to be subject to any common executive authority. The governors were but State executives. The President of Congress was merely a presiding officer. Congress had some slight executive powers, but there was no proper national executive. Much of the weakness of the Confederation was due to this fact, and there was in the Convention of 1787 practical unanimity of opinion that this defect must be cured. Accordingly, the Virginia plan and the Jersey plan, Pinckney's draft and Hamilton's draft, all provided for an executive department.

447. An Independent Executive.—The leading members of the Convention were determined to make the executive department thoroughly independent of the other departments, and especially of the legislature. Mr. Madison said: "Experience in all the States had evinced a powerful tendency in the legislature to absorb all power into its vortex. This was the real source of danger to the American constitutions, and suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles."[1] And Mr. Hamilton: "We have

[1] Elliot, *Debates*, Vol. V., p. 345.

seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments." [1]

448. A Single Executive.—The framers of the Constitution were more or less jealous of executive power. To prevent even the semblance of monarchy, some of them favored an executive that should consist of two or more persons, chosen from the same number of divisions of the Union. On this question the Virginia plan was silent, the Jersey plan proposed a plural executive, while Pinckney and Hamilton each proposed a single executive. By a vote of eight States to three the Convention, in committee of the whole, adopted the unitary plan.

Mr. Randolph stated that the arguments against a single executive were these: (1) the people were opposed to it, and it would never have their confidence; (2) it was unnecessary; and (3) a single chief magistrate would commonly come from the central part of the Union, and consequently the remote parts would not be on an equal footing. It was replied that a plurality of magistrates chosen for the same number of districts would lead to constant struggles for local advantage; that the executive power would be weakened by its divisions and animosities; that the States all had single executives; that a plural executive would be particularly ill-adapted to controlling the militia, the army, and the navy; that the animosities arising from a tripartite executive would not only interrupt the public administration, but diffuse their poison through the other branches of government, through the States, and at length through the people at large.[2]

449. Style and Title of the Executive.—Hamilton proposed that the chief magistrate be called Governor, Pinckney that he be called President. A report submitted to the Convention proposed that his style should be The President of the United States, and his title, His Excellency. President was already familiar to the country; the Albany plan of 1754 contained the name and recommended such an office; Congress had a president, and some of the States styled their chief magistrates president. So this style was generally approved.

---

[1] *The Federalist*, No. 49.

[2] Elliot, *Debates*, Vol. V., pp. 141, 149–151.

Soon after the government went into operation, some of the Federalists in Congress proposed the style, His Highness, the President of the United States, and Protector of their Liberties. It was then agreed that the President should be addressed in official documents simply as President of the United States.

450. Length of Term and Reëligibility.—Hamilton proposed that the President should serve during good behavior. A single term of seven years was the declared preference of the Convention almost to its close, when, owing to a change in the plan of election that had previously been agreed upon, the term of four years was adopted, and the restriction to a single term was struck out.

The wisdom of shortening the term and of making the President eligible for a second term has been doubted from the first, and especially in recent times. The main argument against a second term is that the President will be apt to use the power that his office gives him, as the power to make appointments to office, to promote his reëlection. It has therefore been often suggested that the Constitution be so amended as to limit the President to one term of six or seven years.

CHAPTER XXIX.

ELECTION OF PRESIDENT AND VICE PRESIDENT.[1]

ARTICLE II.

Section I, Clause 2.— Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

451. **Mode of Election.**—A far more troublesome question than that of a single or plural executive was, How shall the executive be chosen? It is said to have occupied more than one seventh of all the time of the Convention. The question may be stated in this more definite form: How can the executive be chosen and at the same time be independent of the power that chooses him? Many different plans were proposed, as, election by the houses of Congress, by the Senate, by the people voting *en masse*, by the people voting in districts; election by electors chosen by the governors of the States, by electors chosen by the people, by electors chosen by the State legislatures, by electors chosen by lot from Congress, by secondary electors chosen by primary electors, and by electors appointed as the State legislatures should direct.

452. **The Convention's First Decision.**—The Virginia plan proposed that the executive should be chosen by Congress, and this mode of election was the decided preference of the Convention until near the end of its session. Many times it declared in favor of this mode by decided votes. And yet, September 4, the Committee of Detail recom-

[1] See references to Chapter XXX.

mended election by electors, and two days later this plan was adopted by a vote as decided as the votes that had previously approved the Virginia plan. The electoral plan appears to have been borrowed from Maryland, in which State it was used for the election of State senators.

453. **Objections to Election by Congress.**—The Convention finally concluded that the independence of the President could not be secured if Congress elected him. It was admitted that a reëlection by Congress, or the possibility of a reëlection, would lead to serious evils. The President would be little more than a creature of Congress. Limiting him to a single term, it was finally concluded, would not meet the difficulty; and so the electoral plan was adopted because it would, as was thought, absolutely exclude the national legislature from any share in the election of the President. This jealousy of Congress, as well as of all official influence in respect to the election, appears in the prohibition: "No Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

454. **Objections to Popular Election.**—On the other hand, it was thought impolitic to adopt any of the plans of popular election that were proposed. It was thought as necessary to avoid the "heats and ferments" of a popular contest as the intrigue and corruption of a congressional contest. That calmness of mind, consideration, and superiority to temporary feeling which were essential, could not thus be secured,— so the Convention argued.

455. **The Electoral Plan.**—So the Convention very deliberately adopted one of the electoral plans that had been proposed. The President should be chosen by State electors, appointed in such manner as the legislatures might determine. It was believed that State colleges of electors, chosen for their fitness, would elect better Presidents than could be elected by either Congress or the people. To prevent the excitement and maneuvering that might attend a single meeting of all the electors in one place (as well, probably, as to save expense), it was provided, in the next clause, that they should meet in their respective States to give their ballots.

The electors of a State collectively are commonly called an electoral college; the groups of electors of all the States, the electoral colleges. The name is found in a law of 1845 that empowers each

State to fill vacancies that may arise in the number of its electors. It had been used informally since 1821.

456. **Plans of Appointing Electors.**—It is left to the State legislatures to decide the manner in which electors shall be appointed. In the early years of the republic, as many as four different methods were used: appointment by the houses of the legislature voting jointly, by the houses voting concurrently, by the people of the States voting State tickets, and by the people voting in districts. Evidently the last gives the freest scope to public opinion, and is also the farthest removed from the ideas of 1787. In 1842 Congress adopted the district plan for the election of Representatives, but the States have abandoned it as a mode of appointing electors. In 1891 the legislature of Michigan passed a law enacting that the representative electors of that State should be elected in and by the same districts as the Representatives, and the senatorial electors in and by two senatorial electoral districts, which districts the legislature also duly constituted; but two years later the law was repealed.

457. **First Mode of Procedure.**—Four Presidents were chosen according to the method that the Convention incorporated in the original clause 3 of this section. It read as follows:

The electors shall meet in their respective States and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President,

the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

458. **First Three Presidential Elections.**—Ten States participated in the election of 1789; there were 69 electors, and 12 persons voted for. Washington received 69 votes, John Adams 34, and all others 35. In 1792 there were 15 States, 132 electors, and 5 persons voted for. Washington had 132 votes, Adams 77, and the three other persons 55. In 1796 there were 16 States, 138 electors, and 13 persons voted for. John Adams had 71 votes, and Thomas Jefferson 68.

459. **Election of 1800.**—At the election of 1800 there were 16 States, 138 electors, and 5 persons voted for. Thomas Jefferson and Aaron Burr, the Democratic-Republican candidates, had each a majority of the electors appointed, but they also had the same number, 73. The party intended Jefferson for the first place and Burr for the second; but in their eagerness to elect the Vice President as well as the President, every elector who voted for Jefferson had also voted for Burr. Hence there was no election, and the House of Representatives had to choose between the two men. For 35 ballots occupying 7 days, during which the House was in continuous session, the vote stood: Jefferson 8 States, Burr 6, divided 2. This result was brought about by the Federalists voting for Burr. The country was filled with excitement, and threats of disunion were heard. But on the thirty-sixth ballot, one Federalist from Vermont and 4 from Maryland declined to vote, which gave those States to Jefferson, while the States of Delaware and South Carolina cast blank votes; so the final vote stood: Jefferson 10, Burr 4, blank 2.

460. Amendment XII.—It was now evident that the electoral plan was not working as its authors had expected it to work. It was plain that it might lead to the election of a President whom the citizens and electors did not intend for that office, and so wholly defeat the national will. To prevent this result, as well as the recurrence of a contest like that of 1800, Amendment XII. of the Constitution was proposed and ratified. It took effect in 1804, and is as follows:

AMENDMENT XIV.— The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives, shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to

the office of President shall be eligible to that of Vice President of the United States.[1]

461. Election of 1825.—Only once since 1800 has the election of President gone to the House of Representatives. In 1824 Andrew Jackson received 99 electoral votes, John Quincy Adams 84, W. H. Crawford 41, and Henry Clay 37. A majority was 132 votes. Mr. Clay was excluded from the further competition by the rule limiting the choice to the three highest candidates on the list, and his following in the House went to Mr. Adams, who was elected. The vote stood: Adams, 13 States; Jackson, 7; Crawford, 4. John C. Calhoun received 182 electoral votes for Vice President, and was declared elected. This election, like that of 1800, was attended by much excitement. General Jackson had received a large plurality of the popular vote as well as of the electoral vote, and he and his friends charged that there was a bargain and sale between Adams and Clay, especially as Clay was made Secretary of State. At the time there was much talk of amending the Constitution so as to exclude the House from all participation in future elections, but nothing was done in that direction.

462. Election of 1876.—The election of 1876 was, with the exception of that of 1800, the most exciting and dangerous one in our history. Of the 369 electors, 184 were in favor of Tilden and Hendricks, the Democratic candidates; 164 in favor of Hayes and Wheeler, the Republican candidates; while from South Carolina, Florida, Louisiana, and Oregon there were plural returns. In all 21 votes were in dispute. Two questions arose: Which are the legal votes for these four States? and, Who shall determine which are legal? The second was the practical question, and nothing in the laws, National or State, or in the practice in counting previous votes, answered it directly. This question filled

[1] This amendment was not made without difficulty. In one Congress it failed to secure the requisite majority, and it finally passed the House of Representatives, December 12, 1803, three years after the election that led to it, only by the Speaker's vote. Nearly a year more passed before the necessary number of ratifications was obtained, and then the vote stood 13 to 4.

Congress and the country with heat and tumult throughout the winter of 1876–77.

463. **The Electoral Commission.**—The Senate was Republican and the House of Representatives Democratic, and it was well known in advance that the houses would not agree when the time came to count the votes. Congress accordingly created an Electoral Commission, for that case only, consisting of 5 Senators, 5 Representatives, and 5 Justices of the Supreme Court, with power to decide which of the disputed votes should be counted. After listening to lengthy arguments *pro* and *con*, the commission decided, 8 to 7, that the Republican votes from all the States in dispute were the legal ones, and the Republican candidates were declared elected, 185 votes to 184.

464. **Law of 1887.**—Serious difficulties in the election of President had now occurred in 1800, 1824, and 1876. Moreover, such difficulties would have occurred at other times, as in 1865 and 1869, had not the same political party controlled large majorities in both houses of Congress. Experience had therefore proved that presidential elections were fraught with serious dangers to the republic. To meet these points of danger, Congress passed, in 1887, an "Act to provide for and regulate the counting of votes for President and Vice President, and the decision of questions arising therein." Section 2 of this act makes the determination of the State authorities, under State laws previously passed, final in all cases of disputed appointments of electors, thus answering the principal question of 1877. Subsequent sections prescribe the mode of procedure in cases of objection to a single return or of plural returns from any State. This law, which is very minute in its provisions, removes from a presidential election many of the dangers that had previously attended it.

465. **The Vice President.**—"If the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as

President, as in case of the death or other constitutional disability of the President." Such a case as this has never occurred. If no candidate for Vice President has a majority of the votes of the electors appointed, then the Senate must choose one of the persons having the two highest numbers on the list for Vice President. R. M. Johnson lacked one vote of an election in 1836, and the Senate promptly elected him. When the election of the President goes to the House, and the election of the Vice President to the Senate, the Vice President may be chosen first.

Section 1, Clause 3.— The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

466. **Days Fixed.**—The Continental Congress appointed the first Wednesday in January, 1789, as the day for choosing the first electors; the first Wednesday in February as the day for the electors to give their votes, and the first Wednesday in March as the day for the new government to go into operation. In 1792 Congress enacted that the appointment of electors should be made within thirty-four days preceding the first Wednesday of December, every fourth year; and this rule continued in force until 1845, when Congress made the day uniform throughout the Union,— the Tuesday next after the first Monday in November. From 1792 to 1887 the electors gave their votes on the first Wednesday in December; the present rule is the second Monday in January. The Old Congress did not fix the day for opening the certificates and counting the votes in 1789; it was done April 16, but since that date the rule has been the second Wednesday of February. The propriety of uniform days for appointing electors, and for the casting of their votes, throughout the Union, is manifest.

The first Wednesday in March, 1789, was the fourth day of that month. Congress enacted in 1792: "That the term of four years for which the President and Vice President shall be elected shall in all cases commence on the fourth day of March next succeeding the day on which the votes of the electors shall have been given." Amendment XII. makes this day a part of the Constitution itself.

The following table is a partial exhibit of the methods that have been employed in appointing electors. (The table is copied, with corrections, from *The Nation*, No. 1351.)

	Legislature.	District.	Gen'l Ticket.
Delaware	1788–1828	. . . .	1832–1888
Pennsylvania	1800	1816	1788–1796 1804–1812 1824–1888
New Jersey	1788–1804 1812	. . . .	1808 1816–1888
Georgia	1788–1800 1816–1824	. . . .	1804 1828–1888
Connecticut	1788–1820	. . . .	1824–1888
Massachusetts	1800–1808 1816	1788–1796 1812,'20–'24	1804 1828–1888
Maryland	. . . .	1796–1832	1788–1792 1836–1888
South Carolina	1788–1864	. . . .	1868–1888
New Hampshire	1800	. . . .	1788–1796 1804–1888
Virginia	. . . .	1788–1796 1812–1816	1800–1804 1824–1888
New York	1792–1824	1828	1832–1888
North Carolina	1812	1792–1808	1816–1888
Rhode Island	1792–1796	. . . .	1800–1888
Vermont	1792–1800 1816	1804	1824–1888
Kentucky	1792–1796	1804–1824	1828–1888
Tennessee	1796–1804	1824–1828	1832–1888
Ohio	. . . .	. . . .	1804–1888
Louisiana	1824	. . . .	1828–1888
Indiana	. . . .	. . . .	1824–1888
Mississippi	. . . .	. . . .	1824–1888
Illinois	. . . .	1824	1828–1888
Alabama	. . . .	. . . .	1824–1888
Maine	. . . .	1824–1828	1832–1888
Missouri	. . . .	. . . .	1824–1888

CHAPTER XXX.

THE FAILURE OF THE ELECTORAL PLAN.

REFERENCES.

Johnston's articles, "The Executive in United States History," "Electors and the Electoral System," "Electoral Votes," and "Disputed Elections," in Lalor's *Cyclopædia;* Stanwood, *History of Presidential Elections;* Bryce, *The American Commonwealth,* Chaps. V., VII., VIII.; *The Presidential Count; A Complete Official Record of the Proceedings of Congress at the Counting of the Electoral Votes, etc.* (Published by D. Appleton & Co.)

It was formerly supposed that the electoral method of choosing the President and Vice President was the happy invention of the Federal Convention. But in later years attempts have been made to find an original for it. Some writers have seen a resemblance between this plan and the election of the Pope by the college of cardinals. Sir H. S. Maine thought the Convention was influenced by the constitution of the Holy Roman Empire, according to which the Emperor was chosen by seven imperial electors. A far more probable conjecture is that the framers of the Constitution found their copy in provisions of the constitution of Maryland, 1776, which delegated the choice of the fifteen State senators to an electoral body chosen every five years by the qualified electors of the State.[1] But whether invented or copied, the electoral scheme has failed more signally to accomplish the ends for which it was designed than any other part of the Federal Constitution. Professor Johnston, who held the theory of invention, remarks that the system is almost the only feature of the Constitution which was purely artificial, and not a natural growth, that it was the one which

---

[1] Stevens: *The Sources of the Constitution,* pp. 152-154.

met least criticism from critics, and warmest praise from *The Federalist,* and that democracy had ridden right over it. The plan excluded Congress from formal participation in choosing the executive, but it did not shut out congressional influence; still less did it exclude the people, or prevent those heats and ferments that the members of the Convention thought it so necessary to shun. Our quadrennial presidential elections are just what the men of 1787 supposed they had made impossible. Amendment XII. has corrected the particular evils that it was designed to correct; but it has not hindered in the slightest degree that political development which, while observing all the forms of the Constitution, has wholly defeated the object of the electoral system, viz.: the election of the President and Vice President by independent electors. In other words, the constitution of the people is at this point wholly at variance with the constitution of the government.

We shall therefore take a general view of the process by which the expected operation of the plan has been frustrated.

467. Party Government.—The rôle parties play in the politics of the country was not foreseen in 1787. By the close of Washington's second administration, party lines were closely drawn; and since this time, save during the Era of Good Feeling (1816-1824), there have been two powerful political parties, nearly matched in strength, one or the other of which has elected the President. Men divide on political questions; the resulting parties are resolved on giving effect to their ideas and policies; and to do this, organization and party machinery become necessary. This development of party government it is that has completely changed the operation of the electoral plan. How this came about, a sketch of the modes of making nominations will show.

468. Nomination by Consent.—In 1788 and 1792 Washington was nominated by the unanimous voice of the people, without delegates, conventions, or popular assemblies. Adams was nominated for Vice President in a similar way, but not with equal unanimity. In 1796, when the Federal and Democratic-Republican parties were already formed, Adams and Jefferson were designated as candidates by the common consent of their respective parties, and in 1800 Adams and Jefferson were again named in much the same way.

469. Nomination by Congressional Caucus.—The first step in

the direction of making nominations by congressional caucus was taken in 1796, when the Democratic-Republican members of Congress agreed to support Jefferson and Burr. The second step was taken in 1800 when Adams and Jefferson were named as presidential candidates in secret caucuses of the Federal and Republican Senators and Representatives. But the first regular congressional nominating caucus was held in 1804, when the Republican members nominated Jefferson and Clinton for President and Vice President. From this time until 1824 the congressional caucus was as much the regular party machine for making nominations as the national convention is now.

470. **Nomination by State Legislatures.**—Owing to the extinction of the Federal party organization, there was but one, or more properly speaking, no, political party in the Era of Good Feeling. The four presidential candidates of 1824 had all belonged to the Democratic-Republican party. The congressional caucus had fallen into disrepute. A small number of Senators and Representatives nominated W. H. Crawford, of Georgia, for President, but the nomination hindered rather than helped him. The candidates of 1824 really stood on their personal merits. Still, legislative caucuses, legislatures, and even county conventions recommended their favorite statesmen to the support of the country. Nominations were in fact made by the general agreement of certain sections of the people. In 1828 they were made in much the same way, except that no congressional caucus was held, and the State legislatures took a more important part.

471. **Nomination by National Conventions.**—The first national convention was held by the Anti-masons in 1831, and nominated William Wirt for President. The second was a National-Republican convention that nominated Henry Clay, also in 1831. The next year the Jackson men, or the Democratic party of recent times, held a convention to declare their "highest confidence in the purity, patriotism, and talents of Andrew Jackson," who had already been nominated by local conventions and State legislatures many times over, and to nominate a candidate for Vice President. Since that time national conventions have been regularly held by the several parties, except that the Whigs held none in 1836.

472. **The Caucus System.**—At first national conventions were very simple, having some features of the mass convention, but now they have become so thoroughly organized as to constitute real party parliaments. The national convention is the crown of the national caucus system, the simplest elements of which are seen in the primary meetings, or caucuses, and executive committees of wards and townships, and the more complex forms in city, county, district, and

State conventions and committees. The like of this system is unknown in any other country. It is the creature of purely voluntary effort; it is no part of the Constitution or laws; and yet it exerts an enormous influence upon the local, State, and National governments, and upon all political life. Its grand object is to increase party strength by concentrating it upon certain chosen ends.

473. **Effect of the Caucus System.**—The most striking effect of this remarkable development of party organization is wholly to nullify the constitutional intent in electing the President and Vice President, while all the constitutional forms are scrupulously kept. That intent was that the electoral colleges shall consist of men wholly uncommitted to particular persons, and free to vote for the fittest men. This was really the case in 1789 and 1792, and to a certain extent in 1796; but since the last of these dates the electors have been themselves appointed in almost every instance with a distinct understanding that they would vote for particular persons. As a result, the electors have no freedom whatever, but are always pledged to vote for party candidates.

474. **Steps in the Election of President and Vice President.**—The whole course of progress from first to last embraces the several steps that follow:

1. The national conventions that make the nominations of candidates are constituted under fixed rules, and are called by regularly appointed committees. The conventions of the Republican and Democratic parties both consist of four delegates at large from each State, and twice as many district delegates as the State has Representatives in Congress.

2. In each State every political party participating nominates two electors at large, sometimes called senatorial electors, and as many district electors as it contains Representatives' districts. These candidates together make up its State electoral ticket. These two steps are in no way required by the Constitution or laws, but belong wholly to the sphere of party management.

3. On Tuesday following the first Monday in November the electors are appointed in all the States by a popular election. This is popularly called the presidential election, and it is so in fact, if not in law. This third step is taken by the authority of State laws, Congress fixing the time. From this time on, the Constitution and laws take exclusive charge of the process.

4. On the second Monday in January the electors meet at their respective State capitals, and vote by ballot, according to the constitutional provisions, for President and Vice President. They make three copies each of the two lists of ballots, naming the offices, the persons, and the number of votes, which they sign, certify, and seal.

One of these copies they send by mail to Washington, addressed to the President of the Senate; one they send to Washington by a special messenger, addressed to the same person; and the third they deliver to the Judge of the United States District Court for the district in which the electors meet and vote.

5. On the second Wednesday of February the Senate and House of Representatives meet in the Hall of the House. The President of the Senate, in their presence, opens the certificates and hands them to the tellers appointed by the houses, who read and count the votes. The person having the greatest number of votes, if a majority of all the electors appointed, he declares President-elect; the person having the greatest number of votes for Vice President, if a majority of all, Vice-President-elect.

6. If no persons have such majorities, then the elections go to the House of Representatives and the Senate as before explained.

475. Irregularities in Elections.—Many perplexing questions have arisen, and many irregularities have occurred, in conducting presidential elections. The provision that no person holding an office of trust or profit under the United States shall be appointed an elector, has been frequently disregarded through inadvertence until it was too late to correct the error. Sometimes an electoral college has failed to meet and vote on the day appointed, as in Wisconsin, in 1856, owing to a severe snowstorm. These and other questions have been disposed of as they have arisen, and have not generally led to legislation. In 1845, however, Congress enacted that the States should by law provide for filling vacancies in their respective colleges. In most cases, if not all, the legislatures have conferred on the college itself the power of filling such vacancies.

NOTE.—The question is sometimes asked, What is the effect of the rule laid down in Amendment XII. that electors shall vote for President and Vice President, "one of whom, at least, shall not be an inhabitant of the same State with themselves"? The rule does not prohibit the election of both officers from the same State. It prohibits the electors of any State from voting for candidates for both offices from their own State, but does not prohibit the electors of other States doing so. Thus, the President and Vice President might both come from Massachusetts or Virginia; but, in the one case, the Massachusetts electors could not vote for both of them, or, in the other case, the Virginia electors could not. The importance of the rule appears in its effect on party nominations; no political party would nominate two candidates from the same State, at least any State that it had any hope of carrying, because the electors from that State would be unable to vote for both of them. Of course, there are other political reasons why no party is likely to do such a thing. The rule works to prevent the election of a President and Vice President from the same State, but indirectly so.

CHAPTER XXXI.

THE QUALIFICATIONS AND REMOVAL OF THE PRESIDENT.

ARTICLE II.

Section 1, Clause 4.— No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

476. **Qualifications of the President.**—Arguments are not called for to show the propriety of the qualifications named, save in one point. In 1787 there were many distinguished men of foreign birth in the country who had rendered it valuable service, and some of whom, as Alexander Hamilton and James Wilson, were members of the Convention that framed the Constitution; and, as a mark of respect to them, the rule was so drawn as to render such men eligible to the presidency. Residence abroad on official duty, as that of a minister, is not a disqualification.

Section 1, Clause 5.— In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed or a President shall be elected.

477. **The Vice President.**—Neither the Virginia plan nor the Jersey plan said anything about the officers of the houses of Congress, or the succession to the presidency in case of the President's death, removal, etc. The draft submitted by Mr. Pinckney provided that the houses should elect their own officers, and that the President of the Senate should become President of the United

States in case of a vacancy. Hamilton's plan agreed with Pinckney's, only he styled the President of the Senate Vice President. The first proposition to have a Vice President proper was made when the electoral-college plan of electing the President was under consideration, near the end of the Convention. It was then provided that every elector should vote for two candidates for President, the candidate having the largest number of votes to be President, if a majority of all, the one having the next largest to be Vice President; and then, to give the office dignity, the Vice President was made President of the Senate. This was a complete reversal of Pinckney's and Hamilton's ideas. The office was opposed as unnecessary, as an encroachment on the right of the Senate to choose its own officers, and as mingling the legislative and executive departments.

No other parts of the Constitution that have been followed by equally important results, were so hastily considered by the Federal Convention as those relating to the Vice Presidency. Apparently, the framers did not foresee the consequences that have followed the creation of the office. The executive chair has been filled by five Vice Presidents.[1] Moreover, it was the vice presidency that compelled the adoption of Amendment XII.

478. Removal of the President, etc.—Only conviction on impeachment can effect a removal of the President, in the sense of the Constitution. A resignation must be made in writing, and be filed in the office of the Secretary of State. What constitutes "inability to discharge the powers and duties of the office" of President, has never been settled. The only executive act performed by President Garfield from July 2 to September 19, 1881, was signing his name to an extradition paper. The question whether a case of inability had arisen, was much discussed at the time, but with no practical result.

---

[1] President W. H. Harrison, inaugurated March 4, 1841, died April 4, and was succeeded by Vice-President Tyler. President Taylor, inaugurated March 4, 1849, died July 9, 1850, and was succeeded by Vice-President Fillmore. President Lincoln, inaugurated for a second term March 4, 1865, died April 14, and was succeeded by Vice-President Johnson. President Garfield, inaugurated March 4, 1881, died September 19, and was succeeded by Vice-President Arthur. President McKinley, inaugurated for a second term March 4, 1901, died September 14, and was succeeded by Vice-President Roosevelt. President Harrison's Cabinet proposed that Mr. Tyler should be styled Acting President, but he declined the proposition and assumed the full title. This precedent has since been followed.

479. The Presidential Succession.—The clause devolves upon Congress the duty of providing by law for the case of the removal, death, etc., of both the President and the Vice President. Congress provided in 1792 that the President *pro tempore* of the Senate, or in case there were no President *pro tempore,* the Speaker of the House of Representatives, should act as President until the disability were removed or a President elected. This law also provided for a special election to fill out the term when the President *pro tempore* or the Speaker had succeeded to the office.

This act continued in force until 1886, when Congress passed an act regulating the presidential succession. This act substitutes the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Attorney-General, the Postmaster-General, the Secretary of the Navy, and the Secretary of the Interior, in this order, for the President *pro tempore* and the Speaker. It also repeals the provision of 1792 in regard to a new election, so that, as the law now stands, any Cabinet officer succeeding would fill out the term the same as the Vice President does. It also provides for calling a special session of Congress within twenty days of the time when any member of the Cabinet becomes President, unless Congress be in session at the time or is to meet within twenty days. It provides further that no Cabinet officer can succeed unless he has been confirmed by the Senate, and also has the qualifications for the presidency named in clause 5 of this section of the Constitution.

480. Objections to the Old Rule.—The objections to the rule of 1792, and the arguments in favor of the new rule, as stated in 1886, are various. One point is that the new plan will be more likely than the old one to lead to continuity of executive policy; another is that the Senate is not certain to have a President *pro tempore,* or the House a Speaker, when he is wanted. For example, the Senate had no such President from March 4 to October 10, 1881, while the House had no Speaker from March 4 to December 5, of the same year. Had Vice-President Arthur died, the nation would have been without a chief magistrate after September 19, unless special action had been taken. It was also urged that the new rule of succession

puts more lives between the executive office and anarchy, and throws new safeguards around the President's life.

Section 1, Clause 6.— The President shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

481. Salaries.—If the President's compensation could be increased during the term that he is serving, he might enter into collusion with members of Congress to effect that object; if it could be diminished, Congress might reduce it and so make the President its creature. All changes therefore must be prospective. In 1789 the President's salary was fixed at $25,000, and such it remained until 1873, when it was raised to $50,000. He is also provided with a furnished house. In 1789 the salary of the Vice President was made $5,000; in 1853 it was raised to $8,000, and in 1873 to $10,000, but was reduced to $8,000 the next year.

Section 1, Clause 7.— Before he enter on the execution of his office, he shall take the following oath or affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

482. President's Inauguration.—Beyond requiring him to take this oath, and fixing the day that he shall enter on the duties of his office, neither the Constitution nor the laws make any provision for the inauguration of the President. All the rest is custom. Before taking the oath, the President delivers an inaugural address, but this is not an official paper and is not required by law. The Chief Justice usually administers the oath, but any magistrate empowered to administer oaths would answer the purpose. According to custom also, the Vice President delivers an address on taking the oath of office. Vice-President Tyler did not think it necessary to take the President's oath, as he had already taken the oath prescribed by law for the Vice President, but he finally consented to take it.

CHAPTER XXXII.

POWERS AND DUTIES OF THE PRESIDENT.

ARTICLE II.

Section 2, Clause 1.—The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

I. THE ARMY AND THE NAVY.

483. The President Commander in Chief.—The effective exercise of military power demands unity of judgment and promptness of decision; while Congress, being a body that consists of two houses which debate and settle questions by voting, lacks those essential qualities. Still, there was some hesitation in the Convention in making the President commander in chief, lest he use his power against the liberties of the country. Such a contingency is, however, sufficiently guarded against by giving Congress the power to declare war, to raise and support the army, to provide and maintain the navy, to make all rules for the government of the military and naval forces, and to provide for calling out the militia. The President delegates his authority to command the army and navy, in actual service, to officers whom he selects for that purpose.

II. THE PARDONING POWER.

484. Reprieves and Pardons.—A reprieve is a temporary suspension of a sentence already pronounced by some

court or tribunal; a pardon is a full release from punishment for an offense, and may be given as well before or during trial as after it. All civilized countries give their executives power to grant reprieves and pardons. However, for reasons stated in another place, the President has no such power in impeachment cases, and the judgment entered in such a case cannot be changed or set aside.

III. Treaties.

Section 2, Clause 2.—He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur. . . .

485. The Treaty-Making Power.—A treaty is a solemn compact or agreement between two or more sovereign states. In monarchies the power to make a treaty, like the power to declare war, is lodged in the crown; the legislature controls either act only through its power over the supplies. The great objection to intrusting this power to the legislature is that the requisite secrecy and decision cannot, as a rule, be thus secured. Still, in a republic it would be as dangerous to give it absolutely to the executive as to give the war power to him. Hence the provision that the Senate must advise and consent to a treaty by a two-thirds vote of the Senators present when the vote is taken.

486. Steps in Making a Treaty.—First, the treaty is negotiated. In this stage the government is represented by the Secretary of State, by a minister residing at a foreign capital, or by a minister or one or more commissioners appointed for the purpose. But the President, acting through the Department of State, directs the general course of the negotiation. If the President positively disapproves of a treaty when negotiated, he commonly goes no farther; if he approves it, or is in doubt whether to approve it or not, he lays it before the Senate. The Senate may approve or disapprove a treaty as framed; it may propose amendments, or it may postpone action until the time for the treaty to go into effect has passed. If the Senate approves, the Presi-

dent usually ratifies the treaty at once; but he may postpone action, or even reject the treaty. If the Senate votes to amend, the treaty is practically a new document, and the foreign power, as well as the President, must assent to it in its new form. Next comes the exchange of ratifications, a formal act by which the signatory powers declare that all the steps necessary to make the treaty binding have been taken. The time within which this may be done is commonly stipulated in the treaty itself. Finally, the President publishes the treaty, with a proclamation declaring it a part of the law of the land.

The Senate considers treaties in executive session. One of the rules governing such sessions is that all confidential communications made by the President to the Senate, including treaties, and all remarks, votes, and proceedings thereon, shall be kept secret until the Senate shall by resolution remove the injunction of secrecy. Commonly the advice and consent of the Senate is consent merely. Sometimes, however, the President sends to the Senate the nomination of a special minister or commissioner to conduct a negotiation.

487. Congress and the Treaty Power.—Although the Constitution vests the treaty power in the President and Senate alone, Congress has sometimes played an important part in making treaties. In 1803 it authorized the purchase of the island of New Orleans, which was one of the steps leading to the Louisiana annexation. It also authorized the Florida and Mexican annexations of 1819 and 1848. In 1845 Congress, by joint resolution, declared that the republic of Texas might enter the Union, either by a treaty or by accepting certain terms laid down in the resolution itself. The second was the course followed. It has been held that Congress should always be consulted in advance when an annexation of territory is contemplated, but this was not done in the case of Alaska. Again, the Constitution provides that "No money shall be drawn from the treasury but in consequence of appropriations made by law." Hence arises the question, What shall be done when a treaty calls for an expenditure of money? Does this action of the President and the Senate bind Congress, or may it refuse to vote

the appropriation? Chancellor Kent says a treaty is as much obligatory upon Congress as upon any branch of the government, or upon the people at large; while Judge Cooley affirms that "it becomes the duty of Congress to make the necessary appropriations, but in the nature of things this is a duty the performance of which cannot be coerced."

488. **Jay's Treaty.**—The relations of the United States and England had become so much strained in 1794 that war between them seemed highly probable. So President Washington, with the advice and consent of the Senate, sent John Jay, the Chief Justice, to London, to negotiate, if possible, a treaty that should settle the questions in dispute. Washington was far from being satisfied with the treaty negotiated, but, thinking it the best one attainable at the time, and preferable to longer contention, gave it his approval. The Senate had ratified it by 20 to 10 votes, June 24, 1795. The publication of the treaty caused an extraordinary excitement throughout the country, which finally culminated in a prolonged and bitter struggle in the House of Representatives. The House adopted a resolution by a vote of fifty-seven to thirty-five disclaiming all claim of power in making treaties, but asserting that Congress had the right to deliberate upon treaties containing regulations on subjects placed by the Constitution in its control. It then adopted by fifty-one votes to forty-eight a resolution that the treaty ought to be carried into effect, and this ended the strife. The controversy in the House hinged on an appropriation of $90,000 that the treaty called for. The House of Representatives has never failed to vote money needed to give effect to treaties, but it has always insisted that it did so on grounds of expediency and not of obligation. Should it ever refuse, the result would be a dead lock that might prove serious.

489. **Scope of the Treaty-Making Power.**—The question of 1796 is a part of a larger one, viz., the character and scope of the treaty-making power. This is not defined, and could not well be defined, in the Constitution, and we must go to the law of nations for such a definition. Three or four facts will show that the power is very far-reaching.

Mr. Jefferson held the opinion that the Constitution does not warrant the annexation of foreign territory, and he advised in 1803 that Louisiana be bought, and that then the Constitution be amended to sanction the purchase. The chiefs of the Democratic-Republican party took the position, in which he finally acquiesced, that the treaty power covers such a case. This view has been generally

accepted. "The Constitution confers absolutely on the government of the Union the powers of making war and making treaties," says Chief-Justice Marshall; "consequently that government possesses the power of acquiring territory, either by conquest or by treaty." Again, the President and Senate have, by treaty, often regulated commercial affairs with other nations: customs, tonnage duties, and the like, and foreigners have been naturalized by treaty *en masse* on the annexation of territory, although the Constitution expressly confers all these powers upon Congress.

490. The Relation of a Treaty to the Constitution and Laws. —The Constitution, the laws made in pursuance thereof, and treaties entered into, are the supreme law of the land (Article VI., clause 2). Hence State constitutions and laws in conflict with a treaty are, to this extent, null and void.[1] In the Cherokee Tobacco Case,[2] the Supreme Court held that a treaty cannot change the national Constitution, or be held valid if it is in violation of that instrument; also that a treaty may supersede a prior act of Congress, and an act of Congress a prior treaty. In the Chinese Exclusion Case,[3] the court held that the act of Congress excluding Chinese laborers from the country is constitutional, although contrary to a treaty previously entered into with China. In 1798 Congress declared the United States freed and exonerated from the stipulations of all existing treaties and conventions with France.

IV. The Civil Service.

Section 2, Clause 2.— . . . He shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.

Section 2, Clause 3.—The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by

[1] Hauenstein *v.* Lynham, 100 U. S. 483.
[2] 11 Wallace 616.
[3] 130 U. S. 581.

granting commissions which shall expire at the end of their next session.

491. **Officers of the United States.**—The Constitution creates Senators and Representatives, and directs how they shall be elected. It creates presidential electors, and commits the mode of their appointment to the State legislatures. It creates the President and the Vice President, and provides for their election. It provides also for a Chief Justice. Furthermore, the Constitution assumes that Congress will, by law, provide for public ministers of various grades, consuls, judges of the Supreme Court and the inferior courts, heads of departments, and inferior officers, and so indirectly gives it power to provide for them. For the most part, however, the Constitution commits the creation of offices to the law-making power. The rule is that the President cannot create offices, or appoint men to offices that have not been created.

492. **Classes of Officers.**—As respects their appointment, officers are divisible into three groups.

1. The President nominates, and by and with the advice and consent of the Senate appoints, ambassadors, other public ministers and consuls, and judges of the Supreme Court.

2. Congress vests the appointment of many inferior officers in the President alone, in the courts of law, or in the heads of departments.

3. The President nominates, and by and with the advice and consent of the Senate, appoints all officers established by law who do not fall into either one of the preceding classes. The heads of departments, for example, fall into this third class, which is a very large one.

493. **Employees of the Government.**—Only a minority of the persons engaged in the civil service are called officers. There are at all times thousands of persons in that service who are employed, not appointed, and are discharged, not removed. In this class are found not only the laborers in the navy yards, arsenals, and elsewhere, but also many persons in continuous service at customhouses and other offices, as well as clerks of committees, commissions, etc.

494. **Vesting the Appointing Power.**—The President

appoints his private secretary and the clerks of his office. The Judges appoint the officers of their own courts, except that the marshals are appointed by the President and Senate. The heads of departments appoint their own subordinates, save the principal ones, which fall into the third class. For example, the Postmaster-General appoints all postmasters whose salaries are less than $1,000.

495. **Nomination and Confirmation.**—The advice and consent of the Senate in making appointments, like its advice and consent in making treaties, is practically consent only. The President sends a nomination to the Senate in writing; the Senate commonly refers the nomination to the committee on the particular branch of the public business with which the officer will deal, as the Committee on Commerce, or the Judiciary; and then, on its report, the Senate confirms or rejects the nomination. If the Senate refuses to confirm, the President makes another nomination, and so on until the office is filled. Sometimes, but rarely, the President has nominated the same man the second time. The Senate acts on nominations in executive session. Defending this mode of appointment, Alexander Hamilton said: "The blame of a bad nomination falls upon the President simply and absolutely; the crime of rejecting a good one lies entirely at the door of the Senate; while if a bad appointment is made, the two participate in the opprobrium and disgrace."[1]

496. **Courtesy of the Senate.**—The theory of the Constitution is that the Senate, in advising and consenting to appointments, attends only to the merits of the persons nominated. The practice is widely different. In his first administration, Washington nominated a naval officer for the port of Savannah, whom the Senate refused to confirm, because the nominee was personally obnoxious to the Senators from Georgia. This was the beginning of the so-called "courtesy of the Senate," according to which the Senate, as a rule, does not confirm a nominee unless he is acceptable to one or both of the Senators from the State in which the office exists, provided they, or one of them, belongs to the political party that for the time has a

[1] *The Federalist*, No. 77.

majority in the body. This custom practically puts the Senators, or a Senator, from a State in the room of the Senate as an advising body.

497. **Power of Removal.**—Save officers convicted on impeachment, the Constitution says nothing about removals from office. At the same time, it is clear that removals are sometimes necessary for causes that would not justify impeachment. Who shall make these removals? Hamilton said in *The Federalist* that the consent of the Senate would be as necessary to displace an officer as to appoint him in the first place; and no other view appears to have been entertained before the Constitution went into operation. But this did not become the practice.

While considering, in 1789, the organization of the Department of State, the House of Representatives discussed the subject of removals thoroughly. Some members advocated the view asserted by Hamilton the year before; others, as Mr. Madison, contended that the power of removal belonged to the President alone; Mr. Benson, of New York, advocated the theory that the President could remove at his own pleasure; while still others held that an officer could not be removed unless actually impeached. The House, by a vote of 34 to 20, and the Senate, by the casting vote of the Vice President, declared in favor of the second theory. Congress accordingly made the heads of the State, Treasury, and War Departments removable by the President alone, and this has been the rule nearly ever since. The decision of 1789 was greatly influenced by the confidence reposed in Washington.

498. **Removals from Office.**—Although Congress left the causes for which removals might be made wholly to the discretion of the President, there were only 73 removals in 10 administrations. Washington made 9, John Adams 9, Jefferson 39, Madison 5, John Quincy Adams 2, Monroe 9. In this period the rule was that the President made removals for legal and moral reasons only. President Jackson, in 1829, introduced a new order of things. In one year he made 734 removals; some of them to punish his political enemies, some to reward his political friends, and some to strengthen his

party. This was adopting in its widest latitude the theory that the President could remove at his pleasure. The new method was borrowed from the politicians of New York, and Mr. Marcy, of that State, defending it in the Senate, said: "When they are contending for victory, they avow the intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim as matter of right the advantages of success. They see nothing wrong in the rule that to the victors belong the spoils of the enemy."

499. **The Spoils System.**—President Jackson's course produced great dissatisfaction. In 1835 a committee of the Senate, Mr. Calhoun chairman, said the spoils system was as perfect a scheme as could be devised for enlarging the power of patronage, destroying love of country, and substituting a spirit of subserviency and manworship, encouraging vice and discouraging virtue, preparing for the subversion of liberty and the establishment of despotism. An attempt was made to enact a law requiring the President, when making nominations that would work removals, to state the fact in his message and to give the reason for which the removals were made. This attempt failed, and President Jackson went on as before. President Van Buren followed in the footsteps of his predecessor. When the Whigs came into power in 1841, although they had vehemently denounced the preceding administration for introducing the spoils system, they adopted it; and from that day to this, when a change of administration has occurred, and especially when it has involved a change of political party, there have been numerous removals for personal, factional, or political reasons.

500. **Civil Service Reform.**—Soon after the Civil War public attention was drawn to the state of the civil service. The Civil Service Reformers, who appeared at that time, hold that the President should be free to chose those officers that have to do with matters of public policy, such as the heads of departments and their principal subordinates, from the party that has elected him; also that these officers should be personally acceptable to him; but they contend that inferior officers and employees, who perform routine duties, should be appointed with sole reference to fitness and during good behavior. They also condemn assessments of money upon office-holders for party purposes. Since 1869 some practical reforms have been made in the civil service.

In 1883 the Pendleton Act was passed, of which these are the principal features: there shall be competitive examinations of candidates in the departments at Washington, and in customhouses and postoffices having 50 clerks; when a vacancy in such a department or office arises, it shall be filled from the four highest on the

list of those who have passed such examinations; each State and Territory shall be entitled to a fair proportion of the appointments. and no appointee shall be absolutely appointed until he has served a probation of six months. This act does not include any appointment that requires the confirmation of the Senate, or many others that do not require it. Following the act of 1883, several Presidents, by executive order, have extended the merit system, as it is called, to many classes of officers and employees that the law did not especially embrace. President McKinley, however, by an order issued in May, 1899, removed a large number of appointees from the classified service. The civil service consists of more than 200,000 persons, of whom a majority are in the classified service.

501. **Tenure of Office Act of 1867.**—President Johnson became involved in a bitter controversy with the Republican party, which had elected him to power and which controlled both houses of Congress. He removed many officers that were obnoxious to him. The Senate while in session could partially prevent such removals by refusing to confirm his nominees, but it had no check on removals made in the recess. So Congress passed, over the veto, the Tenure of Office Act, containing these provisions: That the President might suspend an officer in the recess of Congress; that he should report each suspension to the Senate, together with his reasons for making it, within twenty days after the subsequent assembling of the Senate; that if the Senate should concur with the President, the President might then remove the officer and appoint another one in the usual way; that if the Senate did not concur, the suspended officer should resume his duties. The President's disregard of this law in removing Secretary Stanton was the main cause of his impeachment by the House of Representatives. Soon after the inauguration of President Grant, in 1869, the principal features of this law were repealed, and, in 1887, the remaining ones also.

502. **Present Rule of Removals.**—In the session of the Senate, the President can remove an officer by nominating, and by and with the advice and consent of the Senate, appointing his successor. The appointee does not receive his commission, or the incumbent vacate his office, until the nomination has been confirmed. In the recess, the President can remove an officer by appointing a successor, who at once receives his commission and enters upon the duties of the office. If the Senate refuses at its next session to confirm the nomination, the President makes a second one; but in either event the removal is final and absolute. In the

case of vacancies that occur in the recess of Congress, the procedure is the same as in the case of removals made in the recess. If the Senate fails to act upon a nomination before its final adjournment, the commission expires, and the President must reappoint the incumbent or appoint some other person. All such offices are vacancies in the sense of the Constitution. The power of the President over the civil service is therefore greater in the recess than in the session of the Senate.

503. **Public Ministers.**—The term ministers includes ambassadors, envoys extraordinary and ministers plenipotentiary, ministers-resident, commissioners and *chargé d' affaires*. The rank of a minister is determined by various considerations, as the rank of the power to which he is sent. The United States first appointed and received ministers of the rank of ambassador in President Cleveland's second administration. Ambassadors are now sent to and received from the following countries: Great Britain, France, Germany, Russia, Italy, Austria-Hungary, and Mexico. Envoys extraordinary and ministers plenipotentiary are sent to most of the other powers. Ministers-resident are not now often appointed, nor commissioners, unless to negotiate special treaties. The salaries of ministers range from $6,500 to $17,500, the latter being paid to those at London, Paris, Berlin, St. Petersburg, and Mexico. Several of the ministers are furnished with secretaries called secretaries of legation.

504. **The Army and the Navy.**—The army and the navy also fall within the scope of the appointing power. Unless otherwise ordered by law, all military and naval officers are nominated by the President, and appointed by him by and with the advice and consent of the Senate. Here abuses of the appointing power have been comparatively infrequent. Congress enacted in 1866: "No officer in the military or naval service shall, in time of peace, be dismissed from service except upon, and in pursuance of, the sentence of a court-martial to that effect, or in commutation thereof."

505. **Consuls.**—The functions of consuls are determined by treaties and by the laws of the land appointing them. Besides "general watchfulness over the commercial interests of their nation, and aid to their countrymen in securing their commercial rights," Dr. Woolsey enumerates the following duties belonging to them: Legalizing by their seal, for use within their own country, acts of judicial or other tribunals, and authenticating records of marriages, births, and deaths among their countrymen within their consular districts; receiving the protests of masters of vessels, granting passports, and acting as depositaries of ships' papers; reclaiming deserters from vessels, providing for destitute sailors, and discharging such as have been cruelly treated; acting in behalf of the owners of stranded vessels, and administering on personal property left within their districts by deceased persons, when no legal representative is at hand.[1] Although consuls are not ranked as ministers, they are sometimes charged with diplomatic duties. The President appoints some fifty consuls-general, and about 300 consuls and consular agents. A consul-general exercises a general supervision over all the consuls of his government within the country to which he is sent. Consuls at minor posts receive their compensation in the form of consular fees; those at the important posts receive regular salaries, ranging from $1,000 to $5,000, and pay the fees over to the Treasury.

506. **President's Relation to Foreign Affairs.**—The Constitution empowers the President to nominate, and by and with the consent of the Senate, to appoint, ambassadors, other public ministers, and consuls. He need not wait until Congress shall by law create these offices. Still, there are two effective checks upon this power: the Senate must consent to the appointment, and Congress must vote the salary. This power has been the subject of controversy between the executive and Congress, as in the administrations of Presidents Jackson and Grant. In the latter case, General Garfield and others argued in the House of Representatives that the Constitution creates

[1] *International Law* (6th Edition), p. 154.

diplomatic offices, and that the President can appoint as many men to fill them as he sees fit, subject, of course, to the foregoing limitations.

V. Miscellaneous Powers.

Section 3.— He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and, in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

507. **The President's Message.**—The message delivered at the opening of the annual session of Congress presents an outline history of the government for the year, with the President's views and recommendations, and is accompanied by the annual reports of the heads of departments and other papers collectively known as the executive documents. Special messages relate to special questions. The communications in which the President nominates officers, and in which he gives the reasons why he refuses to sign bills, are also called special messages.

Presidents Washington and Adams delivered their annual addresses in person to the two houses in joint assembly, and each house made a formal reply. This procedure was in imitation of the ceremony attending the opening of Parliament. President Jefferson adopted the simpler expedient, which his successors have followed, of sending to each house a copy of a written message to be read by the clerk or secretary. President Washington sometimes met the Senate in person to confer upon executive business; and it was the original expectation that the relations of the executive and the upper house would be more intimate than they have proved to be in practice. Even now, however, one of the standing rules of the Senate provides that "when the President of the United States shall meet the Senate in the Senate Chamber for the consideration of executive business, he shall have a seat on the right of the presiding officer."

508. **Special Sessions.**— Presidents John Adams, Jefferson, Madison, Van Buren, W. H. Harrison, Pierce, Lincoln, Hayes, Cleveland, McKinley, and Roosevelt have found it necessary to call special

sessions of Congress. The Senate has often been called in special session to transact executive business, but the House of Representatives has never been called alone. It is now the custom for a President, a few days before he retires from office, to issue a proclamation calling the Senate together immediately following the inauguration of his successor. This gives the Senate an opportunity to elect a president *pro tempore*, and the President an opportunity to nominate his Cabinet and other officers. No President has ever had occasion to adjourn Congress.[1]

509. **Reception of Ministers.**—The reception of a minister is a formal acknowledgment of the country that he comes from as belonging to the family of nations. This is the practical effect of the President's reception, but Congress can no doubt reverse such recognition. No nation is obliged to receive as a minister any man whom another nation may choose to send to it; the man himself must be an acceptable person (*persona grata*). A minister, on arriving in Washington, sends his papers to the State Department, and in due time it is signified to him that he will or will not be received. In the former case, he visits the White House, accompanied by the Secretary of State, who introduces him to the President. He delivers an address to the President, and receives from him a reply. He thus becomes the accredited representative of his country to the United States.

510. **The Right of Dismissal.**—A minister may be dismissed for various reasons. The two governments may no longer have a good understanding, the government to which the minister has been sent may no longer consider the country from which the minister comes, a nation, or the minister

[1] Parliament does not convene at a time fixed by law, or adjourn of its own motion. It is convened and prorogued by the crown. However, the law requires that there shall be at least one session every year, and this commonly begins in February. The legal limit of a parliament is seven years, but this is rarely reached. The crown has power to dissolve, as well as to convoke and prorogue Parliament, and this it does almost invariably before the legal limit has expired. In such cases, writs of elections for a new House of Commons must issue within forty days of the dissolution. The average life of a parliament in the nineteenth century was less than four years.

may become an unacceptable person (*persona non grata*). For a government to send a minister his papers, is considered equivalent to a declaration of war.

President Washington dismissed M. Genêt, the French minister, in 1793, for meddling in political matters, and President Cleveland dismissed Lord Sackville, in 1888, for a similar offense. Several nations have recalled ministers on the request of our government. France recalled M. Poussin, in 1849; England, Mr. Jackson, in 1809, and Sir John Crampton, in 1856; Russia, M. Catacazy, in 1872.

511. To Execute the Laws and Commission Officers.—The President must see that the laws are faithfully executed. For this purpose he is clothed with ample power. He is the head of the executive department of the government; he appoints officers; he is in close relations with Congress; he is commander in chief of the army and navy, and on emergencies can call out the militia of the States. Moreover, there is an obvious propriety in his commissioning all officers, civil, military, and naval.

The President's veto power is treated in paragraphs 335-339, inclusive, of this work.

CHAPTER XXXIII.

THE EXECUTIVE DEPARTMENTS.

ARTICLE II.

512. Creation of Executive Departments Assumed.—The first and second clauses of section 2, Article II., quoted in the last chapter, are the only clauses of the Constitution that mention executive departments. The clauses assume that they will be created, and by implication confer power to create them. In fact, several such departments existed under the Confederation. The number, the names, and the functions of these departments were wisely left to the discretion of Congress. Nine have been created, and their history and organization throw much light on the growth of the government and on the distribution of executive business. The heads of the executive departments receive the same salary, $8,000.

513. Department of State.—The Continental Congress took the first steps toward the creation of the State Department. In 1775 it created the Committee of Foreign Correspondence, afterwards called the Committee of Foreign Affairs; in 1781 it established the Department of Foreign Affairs, which, presided over first by R. R. Livingston and then by John Jay, transacted its foreign business down to 1789. In July of that year the new Congress established a new department of the same name, but soon changed the name to Department of State, which it has since borne.

The Secretary of State's duties are not very strictly defined by law, and cannot be. Under the direction of the President, he executes duties relative to correspondence, commissions, or instructions to or with public ministers or

consuls to or from the United States. The originals of treaties, laws and foreign correspondence, together with the seal of the United States, which he affixes to documents that require it, are in his custody. He also authenticates the President's proclamations with his signature. But his principal business is to conduct the foreign affairs of the country, under the President's direction. The Department of State is the first of the departments in dignity, and the Secretary of State, sometimes called the Premier in imitation of the English Premier, is the head of the Cabinet.

514. **Department of the Treasury.**—The first steps leading to the Department of the Treasury were also taken in 1775. In 1781 a Finance Department took the place of the Board of Treasury, which in 1778 had taken the place of the Treasury Office of Accounts. Robert Morris, to whose financiering the country owed so much, was the first Superintendent of this department. The present department was established by Congress in September, 1789.

The Secretary of the Treasury cannot be a person engaged in trade or commerce. He proposes plans for the public revenues and credit; prescribes the form of keeping the public accounts; makes reports annually of the state of the finances, and special reports from time to time as called upon, or as the exigencies of affairs require; superintends the collection of the revenue; issues warrants upon the Treasury for money appropriated by Congress for various purposes, and performs all such duties connected with the fiscal business of the government as the law requires.

515. **Bureaus in the Treasury Department.**—There are in the department the offices of the Comptroller; of six Auditors; of the Treasurer, Register, Comptroller of the Currency, Commissioner of Internal Revenue, Director of the Mint, and Director of the Bureau of Engraving and Printing. In the offices of the Auditors the accounts of the different branches of the public service are audited, as indicated by their titles, which are Auditor for the Treasury Department, Auditor for the War Department, Auditor for the Interior Department, Auditor for the Navy Department, Auditor for the State and other Departments and Auditor for the Post Office De-

partment; the Comptroller supervises the work of the Auditors, and hears appeals from their decisions. The Register keeps all accounts of receipts and expenditures, and is the bookkeeper of the government. The Treasurer receives and keeps the moneys of the United States, and pays them out on warrants drawn by the proper officers. The Comptroller of the Currency looks after the circulation of the national banks, the Commissioner of Internal Revenue supervises that branch of the service, and the duties of the Directors of the Bureaus of Engraving and Printing and of the Mint are sufficiently indicated by their titles.

516. Department of War.—The War Department also antedates the Constitution. As now organized, it dates from August 7, 1789. The Secretary of War has charge of military affairs, under the President; he has the custody of all army records, the superintendence of purchases of military supplies, the direction of army transportation, the distribution of stores, the improvement of rivers and harbors, and the supply of arms and munitions of war.

Besides the general staff corps, under the Chief of Staff, the department contains eleven bureaus, the names of which indicate the duties of their heads, viz.: Adjutant-General's Department, Inspector-General's Department, Judge-Advocate-General's Department, Quartermaster's Department, Subsistence Department, Medical Department, Pay Department, Corps of Engineers, Ordnance Department, Signal Corps, Record and Pension Office. The Military Academy at West Point, established in 1802, is also under the control of the Department of War.

517. The Department of Justice.—The Office of the Attorney-General was established in 1789, and was reorganized as the Department of Justice in 1870. The Attorney-General is the responsible law-adviser of the President and the heads of the executive departments.

The law provides that no head of a department shall employ attorneys or counsel at the expense of the United States, but that when in need of counsel or advice he shall call upon the Department of Justice to attend to the same. The officers of this department must pass upon all titles to land purchased by the government for forts or public buildings. They must also prosecute or defend all suits in the Supreme Court, or Court of Claims, to which the United States is a party. Besides the Attorney-General, the officers of the

department are the Solicitor-General, several Assistant Attorney-Generals, two Solicitors of the Treasury, a Solicitor of Internal Revenue, and a Solicitor for the Department of State. The District Attorneys of the several judicial districts are also subject to the direction of the Attorney-General.

518. Post Office Department.—The Post Office Department is the oldest executive department of the government. In July, 1775, nearly a year before independence was declared, the Continental Congress created a general post office, and chose Dr. Franklin Postmaster-General. The Articles of Confederation intrusted the establishing and regulating of the post office from one State to another throughout the United States to Congress. On the organization of the new government in 1789, the post office was continued, and it was not until 1794 that Congress created the present department. Its head is the Postmaster-General, who controls a larger patronage than any other executive officer of the government.

The operations of the department are shown by their distribution among the four Assistant Postmasters-General.

The First Assistant has charge of the miscellaneous correspondence, the money-order system, salaries and allowances to postmasters, the dead-letter office, and the division of post office supplies.

The Second Assistant has charge of the transportation of mails, including the arrangement of the railway mail service and placing the same under contract, the ocean mail steamship service, etc.

The Third Assistant is charged with the financial business of the department. He has oversight also of the division of postage stamps, etc., and the registered mail system.

The Fourth Assistant is charged with preparing cases for the establishment, discontinuance, and change of name of post offices, the appointment of postmasters, the filing of bonds and oaths, the issuing of commissions, the oversight of post office inspectors, and the management of the free delivery systems.

519. Department of the Navy.—Under the Confederation, the management of the navy was given to the War Office, which also controlled it for some time under the Constitution. Congress created the present Department of the Navy April 30, 1798. The Secretary of the Navy is re-

quired to execute such orders as he shall receive from the President relative to the procurement of naval materials, and the construction, armament, equipment, and employment of vessels of war, and all other matters connected with the navy.

The bureaus are: Navigation, Yards and Docks, Equipment, Ordnance, Construction and Repair, Medicine and Surgery, Supplies and Accounts, Steam Engineering. The United States Naval Academy, located at Annapolis, Maryland, established in 1846, is also under the control of the Navy Department.

520. **Department of the Interior.**—An act of Congress approved March 3, 1849, established the Department of the Interior. It is made up mainly of various offices that had before belonged to other departments, and is less homogeneous than the others. The Patent Office had belonged to the State Department; the Land Office, to the Treasury Department; the Pension Office, to the War and Navy Departments; the Office of Indian Affairs, to the War Department. The heads of these several offices are all styled Commissioners, except the head of the Land Office, who is called the Surveyor-General. In 1867 a Department of Education was created, but the next year it was abolished, and a bureau styled the Office of Education was established in the Interior Department. The head of this office is the Commissioner of Education. His principal duty is to collect and publish facts and statistics in regard to education and schools.

521. **Department of Agriculture.**—A Department of Agriculture, so-called, was established at Washington in 1862. It was neither an executive department nor a bureau in such department. It was like the Department of Education as originally created. The law creating this department declares that its general design and duties "shall be to diffuse among the people of the United States useful information on subjects connected with agriculture in the most general and comprehensive sense of that term, and to procure, propagate, and distribute among the people new and valuable seeds and plants." It was put in charge of a Commis-

sioner of Agriculture. In 1889 Congress made it one of the executive departments, and placed it under the charge of the Secretary of Agriculture. The Weather Bureau is in this department.

522. Department of Commerce and Labor.—An act of Congress approved February 14, 1903, established the Department of Commerce and Labor. Its province is to promote "the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, the labor interests, and the transportation facilities."

Numerous bureaus that had been attached to older departments were transferred to the new one. From the Department of the Treasury were taken the Lighthouse Board, the Steamboat-Inspection Service, the Bureau of Navigation, the United States Shipping Commissioners, the National Bureau of Standards, the Coast and Geodetic Survey, the Bureau of Immigration, and the Bureau of Statistics. The Census Office was transferred from the Department of the Interior, and the Bureau of Foreign Commerce from the Department of State. The Department of Labor (so-called, established in 1888) and the Commission of Fish and Fisheries were made parts of the new executive department. Two new bureaus were created within it. These are the Bureau of Manufactures and the Bureau of Corporations.

523. The Cabinet; Executive Responsibility.—The heads of these nine Departments are popularly called the Cabinet. The name is not found in the Constitution or laws, nor is the Cabinet itself in any way a legal body. The law creates the departments, defines the duties of their heads, and the Constitution empowers the President to require their opinions in writing concerning all subjects relating to the duties of their several offices. The frequent meeting of these officers as a council, under the presidency of the President, to discuss executive business, is conducive to unity and strength of administration; but such meetings, and the idea that these executive officers constitute a cabinet, rest wholly upon usage. Washington called these heads together for this purpose, and the precedent thus set, which he borrowed from England, has been since followed. The Cabinet, as such, has no legal duties to perform. The President defers more or less to its advice, but is not obliged to follow it in any particular. The Constitution holds him, and not his advisers, responsible for the performance of executive business. At the same time, the heads of departments are legally responsible so far as their duties are defined by law. At first the Cabinet consisted of the Sec-

retaries of State, of the Treasury, and of War, and the Attorney-General. The Postmaster-General did not become a member until the administration of General Jackson. The other secretaries became members on the creation of their respective departments. No official record is made of the proceedings of the Cabinet, as its conclusions are recommendatory only. Neither is the President's office an office of record; all executive records are kept in the several departments.

In the Federal convention various efforts were made to distribute executive power and responsibility. One proposed a plural executive (p. 249); another, that the President should have a privy council, consisting of the President of the Senate, the Speaker of the House, the Chief Justice, and the heads of the executive departments, whose duty it should be to advise him in such matters respecting the execution of his office as he should think proper to lay before them, but their advice should not be binding, nor affect his responsibility for the measures that he should adopt. The Virginia plan proposed that the executive and a convenient number of the judiciary should compose a council of revision, to examine every act of Congress before it took effect, and that the dissent of the said council should amount to a rejection of such act unless it were again passed. Happily, these propositions all failed.

524. Articles I. and II.—There is a marked difference in the ways in which the statesmen of 1787 treated the legislative and the executive branches of the government. The first occupies in the Constitution more than double the space that is occupied by the second, and the language employed is also more specific and definite. This is partly because the legislative power, by its very nature, is more fundamental than the executive power; while the executive, also by its very nature, is incapable of as strict definition and limitation as the other. The more carefully the executive power, as constituted by the Constitution, is studied in the light of the development of the nation, the greater will its range of application appear to be. It is admitted that the President of the United States, although elected and holding his office for but a limited term, is one of the most powerful executive officers on the globe.

NOTE.—The author of *The Sources of the Constitution* prints some interesting notes of a conversation held with Ex-President Hayes, September 30, 1884. An abridgment of these notes is given.

Referring to the action of a President independently of the advice of the Cabinet, he said he himself and other Presidents had so acted occasionally. As to the general relations of the Cabinet, Presidents were masters of the situation, not only by law, but by the fact that Cabinet officers were appointed by and were dependent upon the executive. The custom of the past had varied; some Presidents had been more influenced by their Cabinets than

others; President Buchanan was much worried by his Cabinet, because not strong enough to insist on his own will. On the other hand, President Lincoln had decided on his Emancipation Proclamation without consulting his Cabinet, to whom he read it over merely for suggestion and amendment. He (President Hayes) had once decided a measure, overruling his Cabinet. He knew them to be opposed to it and did not ask their views, but announced his own policy and carried it out. In matters of a department, he gave greater weight to the opinion of the Secretary of that department if the Secretary opposed his own views; but on two occasions he had decided and carried out matters against the wishes of the Secretary of the department affected. He had done so in the case of his Secretary of the Treasury, whose opinion he usually valued. In each case, knowing the certainty of diverse views from the Secretary, he had not asked those views, but had announced to the Secretary his own policy and decision. As to whether the President or the Secretaries usually initiated business at meetings of the Cabinet, he said that there was no uniform practice; but that every Secretary was full of ideas as to his own department. When wishing to introduce a measure, the Secretary usually consulted the President privately. If the President disfavored the proposed measure, it was of course dropped. In fact, no measures could succeed except by the President's own act in either introducing them or approving them.

Few writers or public persons have understood the real power of the American executive. Practically, the President has the nation in his hand. He is commander in chief of the army and navy, and has control of foreign affairs. He could at any time force Congress into war with foreign powers. The complicated relations with foreign powers rendered this always easy. By law, Congress had the power to declare war, but the real power was with the executive; if but once war exists, the President has the "war powers," and no man has defined what those are, or placed a limit on them. The executive power is large because not defined in the Constitution. The real test has never come, because the Presidents have, down to the present, been conservative, or what might be called conscientious men, and have kept within limited range. There is an unwritten law of usage that has come to regulate an average administration; but if a Napoleon ever became President, he could make the executive almost what he wished to make it. The war power of President Lincoln went to lengths which could scarcely be surpassed in despotic principle. President Lincoln had been practically a dictator. The scope of the power had never been really realized, and the practical use of power, even by an ordinarily strong President, was greater than the books ever described. Much of the legislation of Congress is ordinarily initiated by the President. The Constitution did not provide for this, but in practice it is done. A large part of legislation was first considered in Cabinet, and then started in Congress by contact privately between the Secretaries and the Committees of Congress. The President's message is without legal force, and Congress can be influenced by it or not as it sees fit; but if one were to compare the messages with legislations, it will be found that legislation largely resulted from the suggestions of messages. Really, the message made a public statement of matters, which, less officially, were pressed upon Congress by Cabinet ministers. While it was a fact that no regular channel of necessary legislative initiative was possessed by the President, he, nevertheless, did initiate a large proportion of, sometimes the leading, legislation of his administration. He had also a certain amount of influence in preventing legislation that was distasteful to him, or even in shaping and amending bills in Congress, by intimating unofficially his disapproval and possible veto.—Page 165, *et seq.*

CHAPTER XXXIV.

VESTING THE JUDICIAL POWER.

ARTICLE III.

REFERENCES.

The following special references will be found useful: *The Writings of John Marshall, etc.* (a compilation of his great constitutional decisions); Coxe, *Judicial Power and Unconstitutional Legislation; Constitutional History of the United States as seen in the Development of American Law,—a Course of Lectures before the Political Science Association of the University of Michigan* (Thomas M. Cooley, Henry Hitchcock, George W. Biddle, Charles A. Kent, and Daniel H. Chamberlain); Stevens, *Sources of the Constitution*, Chap. VII.

525. The Period of the Confederation.—The ninth of the Articles of Confederation made Congress the court of last resort on appeal in all disputes and differences between two or more States concerning boundary, jurisdiction, or any other cause whatever. The same article also gave Congress authority to establish courts for the trial of piracies and felonies committed on the high seas, and courts for reviewing and determining finally all cases of captures. Congress acted in the first capacity on one or more occasions, and also organized courts such as the second provision called for. But neither Congress nor these courts had the power to execute their judicial judgments when they were questioned. The State courts even construed the Articles of Confederation. Evils both numerous and serious resulted from this state of things. Hence it was natural that all the plans of government laid before the Convention proposed a judicial department of equal rank and dignity with the legislative and executive departments.[1]

[1] On this topic, consult Jameson, *Essays on the Constitutional History of the U. S.*, "The Predecessor of the Supreme Court."

Section 1.—The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

526. **Judiciary Act of 1789.**—The Constitution itself created the judicial department of the government. It said there should be one Supreme Court, and defined its jurisdiction. But the creation of inferior courts, and all matters of detail in regard to the Supreme Court, it left to the discretion of Congress. Congress gave these provisions effect by enacting the Judiciary Act, approved by President Washington September 24, 1789. This act has undergone minor changes, but in its essential features it still stands, a monument to the genius of Oliver Ellsworth, of Connecticut, afterwards Chief Justice, who drew the bill, and to the First Congress.

527. **Provisions of the Judiciary Act.**—This act provided that the Supreme Court should consist of five Associate Justices in addition to the Chief Justice, and that it should hold two sessions annually at the seat of government. It provided for District Courts to be held by District Judges, to sit four times a year, each district to consist of a State or some defined portion of a State. It also created three Circuit Courts, each one to sit twice a year in each of the several districts composing it, and to consist, when fully organized, of two Justices of the Supreme Court and of the District Judge for the district where the court sat. It also created the office of Attorney-General, and provided for a marshal in every judicial district.

528. **Present Organization of the Original Courts.**—At first the Supreme Court consisted of the Chief Justice and five Associate Justices; in 1807 the number of Associates was increased to six; in 1837 to eight; in 1863 to nine; in 1866 Congress enacted that no more vacancies should be filled until the number was reduced to six; and then, in 1869

the number was made eight again. The Supreme Court holds one regular session a year at Washington, beginning the second Monday of October.

The admission of new States, the growth of population, and the consequent increase of business has multiplied the number of District Courts until there are now over seventy. The times and places of holding these courts are regulated by law. The rule is two terms a year in every district.

At first there were no Circuit Judges so called; the Circuit Courts were held by the Supreme and District Judges. Congress in 1801 created sixteen Circuit Judgeships, but the next year repealed the act and legislated the judges out of office. In 1869 Congress created nine Circuit Judgeships, one each for the nine circuits, and in 1891 as many more; one or two additional judges have since been provided for most of the circuits, until now there are in all twenty-seven Circuit Judges. The Circuit Courts are held in the several districts of the several circuits by the Circuit Justice, as the Supreme Justice assigned to the circuit is called, or by a Circuit Judge, or by the District Judge of the district, sitting alone, or by any two of the said judges sitting together. The Circuit Justice must visit each district in his circuit at least once in two years. The sessions of these courts are held at stated times fixed by law, and at special times fixed by the judges. There must be at least one session in each district each year.

529. **The Circuits, etc.**—First Circuit, four districts and four District Judges, consists of Maine, Massachusetts, New Hampshire, and Rhode Island. The Second Circuit, six districts and seven judges, of Connecticut, New York, and Vermont. The Third Circuit, five districts and six judges, of Delaware, New Jersey, and Pennsylvania. The Fourth Circuit, eight districts and eight judges, of Maryland, North Carolina, South Carolina, Virginia, and West Virginia. The Fifth Circuit, fifteen districts and thirteen judges, of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. The Sixth Circuit, nine districts and nine judges, of Kentucky, Michigan, Ohio, and Tennessee. The Seventh Circuit, five districts and five judges, of Illinois, Indiana, and Wisconsin. The Eighth Circuit,

fourteen districts and fifteen judges, of Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Wyoming, and Utah. The Ninth Circuit, seven districts and seven judges, of California, Idaho, Montana, Nevada, Oregon, and Washington. There are 9 circuits, 27 Circuit Judges, 73 districts and 74 District Judges. Each judicial district has its own district attorney, clerk, and marshal. For the Federal District and Territories, see Chap. XXXVI.

530. Judge's Tenure of Office.—Each United States judge holds office during good behavior. There is no legal way of ousting a judge but by conviction on impeachment, and hence no other way of showing that his behavior is bad. If a judge becomes mentally incompetent to perform his duties, he can be removed from the bench only in that way.

Nothing is more essential to a judicial system than the independence of the judges. The United States judges are rendered independent of the people by vesting their appointments in the President and Senate, and independent of the appointing power by making the tenure good behavior. If they were elected, they might court popular favor to secure reëlections; if they were appointed for limited terms, as four or six years, they might court the President and the Senate to secure reappointments on the expiration of their terms. The Constitution gives the President and the Vice President, Senators and Representatives fixed terms; but these all have political power, which is far more liable to abuse than judicial power.

531. Compensation of the Judges.—The compensation of the judges cannot be diminished during their continuance in office. If Congress could diminish it, the judges would be dependent on that body and the independence of the judiciary would be destroyed. *The Federalist* very justly observes: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." Congress may reduce the salaries, prospectively, although it has never done so, but the reduction can take effect only on the appointment of new judges. The judges' salaries, however, may be raised after their appointment, and

they frequently have been raised. The President's salary can neither be increased nor diminished during his term of office; but there is no reason for the first restriction in the case of the judges, since they have nothing to do with making laws and fixing salaries, as the President has. When the Circuit Judges were legislated out of office in 1802, the constitutionality of the act was denied, and it is held now by some authorities that it was unconstitutional to refuse them their salaries.

At first, the Chief Justice received a salary of $4,000, the Associate Justices $3,500, and the District Judges $1,000 to $1,800. As fixed in 1903, the salaries are: the Chief Justice, $13,000; the Associates, $12,500; the Circuit Judges, $7,000; the District Judges, $6,000. An act approved April 10, 1869, provides that any judge who has held his commission ten years, and attained the age of seventy years, may resign his office and continue to draw his salary during life.

The members of the Supreme Court divide the nine Circuits among themselves according to their convenience. In 1903, for instance, the assignment was as follows: First Circuit, Mr. Justice Holmes; Second Circuit, Mr. Justice Peckham; Third Circuit, Mr. Justice Brown; Fourth Circuit, Mr. Chief Justice Fuller; Fifth Circuit, Mr. Justice White; Sixth Circuit, Mr. Justice Harlan; Seventh Circuit, Mr. Justice Day; Eighth Circuit, Mr. Justice Brewer; Ninth Circuit, Mr. Justice McKenna.

CHAPTER XXXV.

THE EXTENT OF THE JUDICIAL POWER.

ARTICLE III.

Section 2, Clause 1.—The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

532. **Cases.**—A case, within the meaning of the Constitution, is a subject on which the judicial power is capable of acting, and which has been submitted to it in a manner required by law. The judicial power extends to such cases, and to nothing else. The powers of the national courts are very great, but until a case comes before them they cannot act in any manner.

Some of the States have had councils of revision, consisting of the superior judges and other officers, charged with reviewing the enactments of the legislature as soon as passed, and setting aside such as were deemed unconstitutional. Such a proposition was made in the Federal Convention, but the judges were wisely limited to hearing and determining cases.

533. **Law and Equity.**—The judicial power extends "to all cases in law and equity arising," etc. This language refers to the different modes of proceeding in the courts of common law and the courts of equity, recognized in the English system of jurisprudence.

In vindicating the equity jurisdiction of the national courts, Mr. Hamilton says in *The Federalist:* "It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains. These are contracts, in which, though there may have been no direct fraud or deceit sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the Federal judicatories to do justice without an equitable, as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different States, may afford another example of the necessity of an equitable jurisdiction in the Federal courts."[1]

534. **The Constitution, Laws, and Treaties.**—The judicial power extends to all cases in law and equity arising under the Constitution, laws, and treaties of the United States. This makes it the duty of the judges to interpret and to construe these three great divisions of the law. The need of a judiciary having this wide jurisdiction is obvious. Hamilton wrote in *The Federalist* that "thirteen independent courts of final jurisdiction over the same causes arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."

"The judges declare the law, they do not make it," says Chief-Justice Marshall; "the judicial power has no will in any case. Judicial power as contra-distinguished from the power of the law has no existence; courts are the mere instruments of the law, and can will nothing."

535. **Classes of Cases.**—The judicial power extends to the following subjects: (1) all cases in law and equity arising under the Constitution, laws, and treaties of the United States; (2) cases affecting public ministers and consuls; (3) cases of admiralty and maritime jurisprudence; (4) controversies to which the United States is a party; (5) controversies between two or more States; (6) controversies between a State and citizens of another State; (7) controversies between citizens of different States; (8) con-

[1] No. 80.

troversies between citizens of the same State claiming lands under grants of different States; (9) controversies between a State, or its citizens, and foreign states, citizens, or subjects.

Ministers are the accredited agents of foreign governments to our own, and the extension of the State judicial power to cases affecting them would at once lead to troublesome complications; foreign powers hold the United States responsible for the treatment of their represenatives, not the States. It is as clear that the Federal courts should have exclusive jurisdiction in admiralty and maritime jurisprudence, as that Congress should have exclusive power to legislate concerning commerce. The United States could not with either safety or dignity become a party to a suit in any but their own tribunals; while the same tribunals, free from local jealousy and contention, and conducted in a national spirit, are the fittest ones in the world to adjudicate controversies between States, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

The language, "to all cases affecting ambassadors," etc., has been the subject of judicial construction. The Supreme Court has decided, for example, that an indictment for an assault upon a public minister is not such a case within the meaning of the Constitution.[1]

536. **Chisholm v. Georgia.**—The sixth of the above provisions extended the judicial power to controversies between a State and citizens of another State; and the ninth extended it to controversies between States and foreign citizens or subjects. It seems to have been assumed while the Constitution was in course of ratification, that these provisions related only to suits brought by the States, and did not authorize suits by such parties against them; or, at the utmost, that the States should not be made defendants in suits against their will. Soon, however, such citizens and subjects began to bring actions against States, and States began to take alarm. It was not consonant with the ideas then current that States should be brought before a legal tribunal by a private individual, whether an American or a

[1] The U. S. *v.* Ortega, 11 Wheaton 467.

foreigner. The sole question was whether such suits were authorized by the Constitution. This question was brought to an issue in the celebrated case of Chisholm *v.* Georgia, decided by the Supreme Court in 1793.[1] Delivering the judgment of the court, Chief-Justice Jay answered the question emphatically in the affirmative. This decision, which unfortunately was rendered by a divided court, at once increased the alarm. The result was that Congress proposed, and a sufficient number of States ratified, the following amendment, which took effect in 1798:

537. **Amendment XI.**—The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

"This amendment at once made such actions as that of Chisholm *v.* Georgia impossible. A State may still be sued by another State or by a foreign state, but not by its citizens or subjects. It has also been decided that the prohibition extends to the citizens of a State. Thus, in Haus *v.* Louisiana the Supreme Court held: 'a state cannot, without its consent, be sued in a Circuit Court of the United States by one of its citizens, upon a suggestion that the case is one that arises under the Constitution of the United States.'[2] It is a common principle of law that a sovereign, as a State of the American Union or an independent power, cannot be made a defendant in a lawsuit, under ordinary conditions. The assumption is that such State or power will do what is right without compulsion. Still it should be added, that such sovereign may, by an act of its legislature, consent to be made such defendant, and States have sometimes done so. It should also be remarked that the eleventh Amendment did not interfere with the right of the States to use the National courts; whatever rights the States had under the original Constitution they still have."

---

[1] 2 Dallas 419.
[2] 134 U. S. 1.

CHAPTER XXXVI.

THE JURISDICTION OF THE SEVERAL COURTS.

ARTICLE III.

Section 2, Clause 2.—In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

538. Kinds of Jurisdiction.—A court has original jurisdiction of a case when the case may begin in that court; appellate jurisdiction, when a case begun in some lower court may be brought before it for review by some process provided by law, as by appeal and writ of error. A court has exclusive jurisdiction of a case when no other court can take cognizance of it, or administer a particular remedy with reference to it. Two or more courts have concurrent jurisdiction of a case when it may be tried in either of them at the will of the suitor.

539. Original Jurisdiction of the Supreme Court.—The Supreme Court has original jurisdiction of cases affecting ambassadors, other public ministers, and consuls, and cases to which a State is a party. The Judiciary Act of 1789 gave the court a wider original jurisdiction than the Constitution had conferred, but the court decided in 1803 that Congress had no such power, and that the provision was unconstitutional.[1] On the other hand, Congress has divided the original jurisdiction of the Supreme Court with inferior courts, and such legislation the court has sustained. Chief-Justice Waite discusses the subject at length in one of his

[1] Marbury *v.* Madison, 1 Cranch 137.

decisions, and reaches the conclusion that it rests with Congress to say to what extent it shall grant to the inferior courts jurisdiction in cases where the Constitution vests original jurisdiction in the Supreme Court.[1] The substance of such decisions is, that Congress cannot enlarge the original jurisdiction of the court, but may divide it with inferior courts.

540. Appellate Jurisdiction.—Subject to the regulation of Congress, the appellate jurisdiction of the Supreme Court is coëxtensive, both as to law and fact, with the jurisdiction of the inferior National courts and with the State courts in respect to Federal questions. Appeals or writs of error may be taken, under certain prescribed limitations, from the District and the Circuit Courts in cases involving the following questions: the jurisdiction of the court; prize cases; capital or otherwise infamous crimes; the construction or application of the national Constitution; the constitutionality of a law of Congress or the validity or construction of a treaty, and the conformability of a State law to the National Constitution. Appeals also lie to the Supreme Court from the Supreme Courts of the Territories.

The Constitution is silent concerning appeals to the National courts from the State courts; but clause 2, Article VI., makes the Constitution and the laws of the United States enacted in pursuance thereof, and all treaties made under the authority of the United States, the supreme law of the land, and the judges in every State are bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. In pursuance of this clause, Congress provided in the twenty-fifth section of the Judiciary Act for the appeal to the Supreme Court of all final decisions and decrees of State courts infringing upon the validity of the National Constitution, laws, and treaties. Some of the States, notably Virginia, denied absolutely that the Constitution conferred any such power, but the Supreme Court strongly affirmed it in one decision after another, and its existence is now universally admitted. Congress has also provided for the removal from the State courts to the National courts of cases involving questions drawing into construction the

[1] Ames *v.* Kansas, 111 U. S. 449.

Constitution, laws, and treaties of the United States. Exercising these powers, the Supreme Court has set aside State laws as unconstitutional far more frequently than National laws.

541. Circuit Courts.—The Circuit Courts are courts of both civil and criminal jurisdiction. In civil cases they have original jurisdiction in cases where the matter in dispute exceeds $2,000, exclusive of costs, in copyright cases, in patent-right cases, and in many others. In criminal cases they have original jurisdiction, and in capital cases exclusive jurisdiction. The Circuit Courts have no appellate jurisdiction whatever.

542. Circuit Courts of Appeals.—An act approved March 3, 1891, provided for the appointment of an additional Circuit Judge in each circuit, and created in each circuit a Circuit Court of Appeals to consist of three judges, of whom two constitute a quorum. The Justices of the Supreme Court, the Circuit Judges, and the several District Judges are competent to sit as judges of this court within their respective circuits; the District Judges to sit, however, only in the case of the absence of the Justice of the Supreme Court assigned to the circuit, or one or both of the Circuit Judges. These courts hold a term once a year in the several circuits, in certain designated places: In the first circuit, Boston; in the second, New York; in the third, Philadelphia; in the fourth, Richmond; in the fifth, New Orleans; in the sixth, Cincinnati; in the seventh, Chicago; in the eighth, St. Louis; in the ninth, San Francisco, and in such other places in the several circuits as the law may from time to time designate.

As the name implies, these are exclusively courts of appeals. They can review, on appeal or writ of error, the final decisions of the District and Circuit Courts in all cases other than those that are directly reviewable by the Supreme Court, and their decisions are in many instances final, as in patent, revenue, criminal, and admiralty cases. These courts were organized to relieve the Supreme Court of a part of its overgrown business.

543. **District Courts.**—The District Courts have a limited range of jurisdiction in civil cases, and especially in cases in admiralty. They have also jurisdiction of many crimes and offenses under the laws of the United States, committed within their several districts or upon the high seas.

544. **Court of Claims.**—No sovereign state can be sued without its own permission. If it could be sued in the tribunals of another state, it would not be sovereign; and if in its own tribunals, that would be an implication that it was unwilling to do justice without coercion. Formerly, persons having claims against the United States that they could not adjust through the executive departments had no redress but to petition Congress for relief. This method caused much delay and injustice, and also imposed burdensome duties upon Senators and Representatives in investigating cases. So Congress, in 1855, created the Court of Claims to adjudicate certain classes of claims against the United States. Since then, however, Congress has given a limited jurisdiction over such cases to the District and Circuit Courts. In both instances, however, Congress must appropriate money to pay the judgments. The Court of Claims consists of a Chief Justice and four Judges.

545. **Courts of the Federal District and the Territories.**—The judicial power as dealt with in the Constitution directly relates only to the States. But it was plainly necessary for Congress to provide courts for the District of Columbia and the Territories, and power to do so was indirectly conveyed by the constitutional provisions in relation to the District and Territories. The Supreme Court of the District consists of a chief justice and five associate justices. Besides the general term, at which two or more judges may sit, the justices of this court hold singly special terms, district courts, and criminal courts. The justices are paid a salary of $6,000. The Court of Appeals of the District of Columbia consists of a chief justice and two associate justices, the first paid a salary of $7,500, the others $7,000. The inferior courts of the District are a police court and courts held by

justices of the peace. The judicial power in the Territories is generally vested in a chief justice and associate justices, who hold a general term and special terms, or what we may call a supreme court and district courts. The Circuit Courts of Appeals have an appellate jurisdiction as respects the Territorial courts. Alaska, Arizona, and Hawaii are assigned to the Ninth Circuit, New Mexico and Oklahoma to the Eighth Circuit.

546. **Concurrent Jurisdiction of State and National Courts.**— The Constitution does not, in terms, or by necessary implication, exclude the State courts from the judicial jurisdiction that it bounds, save in the cases of ministers and consuls and in cases to which a State is a party. Save in these particulars, the whole subject was left to the discretion of Congress. Congress has given the National courts exclusive jurisdiction in certain classes of cases, such as in patent rights and admiralty, but within certain limits it grants to the State courts a civil jurisdiction concurrent with that of the National courts. This is permitted and not vested; for the Supreme Court has decided that "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." In a large range of legal business, therefore, the suitor may appeal to the State or the National courts, as he sees fit; the ultimate authority, of course, residing in the latter. Some offenses against the National laws may be prosecuted in the State courts, as those against the postal laws.

CHAPTER XXXVII.

TRIAL BY JURY.

ARTICLE III.—AMENDMENTS.

Section 2, Clause 3.—The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

AMENDMENT V.—No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

AMENDMENT VIII.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT XIV., *Section 1.*— . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

547. **Trial by Jury.**—Trial by jury, especially in criminal cases, has for centuries been one of the most jealously guarded rights of the English-speaking people. Magna Charta, granted by King John in 1215, declared: "No freeman shall be taken, or imprisoned, disseized, or outlawed, or banished, or any way injured; nor will we pass upon, nor send upon him, unless by the legal judgment of his peers, or by the law of the land." This means that no man should be condemned in any of the king's courts, unless first tried by his peers. In England trial by one's peers means trial by his equals, as a peer by peers; in the United States it means a trial by an impartial jury. In the national courts, the right of trial by jury is preserved in all criminal cases, and in all civil cases when the amount in controversy is more than twenty dollars. A trial jury consists of twelve men, and a verdict requires unanimity. Impeachment has been discussed in another place.

548. **Place of Trial.**—To save trouble and expense to both the defendant and the prosecution, it is provided that criminal cases must be tried in the State and judicial district where the crime is committed. There the witnesses are likely to be found. The original rule required the holding of a court having criminal jurisdiction in every State, and suggested the State as the territorial unit of the District Courts. Amendment VI. makes the place of trial still more definite; it must be within a judicial district previously determined by law. Crimes committed in the District of Columbia are tried in that District; crimes committed in the Territories, in the Territories where they are committed. The rule governing other crimes the law thus defines: "The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

549. **Right to a Speedy Trial, etc.**—In former times

the postponement or denial of trial in criminal cases was a great abuse. Innocent men were often imprisoned, and then denied an opportunity to vindicate themselves. Their trials were often secret, and at a distance from the prisoner's residence, thus cutting him off from the public knowledge and the sympathy of his friends. Such abuses of power are precluded by the above provisions.

550. **The Grand Jury.**—There are two juries known to the law, the grand jury and the petit jury. The first indicts the accused, the second tries him. A grand jury consists of any number of men, from fifteen to twenty-three. On the empaneling of a grand jury, the judge charges it to inquire into all offenses against the laws of the United States committed in the district, and to report its findings. It sits in secret, and twelve members must concur in any presentment or indictment that it finds. It must first decide that a crime has been committed, and then that there is or is not sufficient testimony against the accused to justify a formal trial. Manifestly, this deliberate mode of procedure applied to cases arising in the army and navy in times of war and public danger, would be destructive of military discipline, and so the Constitution here leaves the way open for the more summary processes of military courts.

551. **Presentment and Indictment.**—A presentment is an accusation by a grand jury charging an offense based upon their own knowledge, or upon evidence before them, and is not made at the suit of the government. An indictment is formally drawn up by a prosecuting officer of the government and laid before the jury with the evidence. If the members of the jury think the evidence such as to warrant a prosecution of the case, they endorse on the back of the paper "a true bill," or "found"; but if they think the accusation groundless, they throw the bill out, or endorse it "not a true bill," or "not found." If the jury presents a person, he must then be regularly indicted before he can be put on trial. If a bill is not found, the accused goes free, but he may be indicted by a second grand jury.

552. **Jeopardy of Life or Limb.**—"Put in jeopardy of life or limb" is a common-law phrase meaning put on trial for some criminal offense. A person once tried for an offense and acquitted, cannot be put on trial for the same offense the second time. This is one of the great bulwarks of personal liberty. Without it, the government might subject the citizen or subject to constant persecution, or a man's enemies might subject him to constant annoyance.

553. **No Man Compelled to be a Witness against Himself.**—Another great legal bulwark of English liberty is the provision that no one shall be compelled to be a witness against himself. In former times, it was common to convict criminals, and especially slaves or other despicable persons, on their own testimony, extorted by some brutal mode of examination. Men were racked, or otherwise put to the torture and confession was thus forced from them. In justification of this method, it was held that a man conscious of guilt would make a plain confession. "As if," says Justice Story, "a man's innocence were to be tried by the hardness of his constitution, and his guilt by the sensibility of his nerves." In some countries accused persons are still compelled to give evidence against themselves.

554. **Taking Private Property for Public Use.**—The justice of the rule in regard to taking private property for public use is too obvious for extended remarks. If the government wants certain land for a customhouse or an arsenal, it can have the land; what is called eminent domain, or the right of the public to use private property for public use, gives it power to take the land it wants; but it must pay a just compensation. If the government and the owner of the property cannot agree upon a price, the government condemns the land, and a jury is empaneled to assess the damages.

555. **The Common Law.**—The Common Law of England consists of the old legal customs of the country. It is called the unwritten law (*lex non scripta*) in contradistinction to the statute or written law (*lex scripta*). The common law originated in the de-

cisions of judges and the usages of political bodies; the statute law, in formal acts of Parliament. The common law was introduced into the English colonies at their planting, and is now in force in all of the States, except Louisiana, save where it has been modified or set aside by legislation. The expression "suits at common law" is used in opposition to suits in equity or in maritime jurisdiction. When any fact once tried by a jury is reëxamined in any court of the United States, the rules of the common law must be observed. Reëxamination means a new trial. The court that tried the case may grant such trial, or the case may be carried to a higher court on a writ of error or by an appeal. A writ of error removes the cause for reëxamination as respects the law, but not the fact; an appeal removes it for examination in both particulars.

556. Due Process of Law.—Amendment V. assumes due process of law in respect to the National judiciary; Amendment XIV. imposes it upon all the States, and besides the same rule is found in the State constitutions. The Supreme Court has said it "is intended as an additional security against the arbitrary spoliation of property."

The words "due process" are incapable of close definition. They mean, according to the Supreme Court, a process "which, following the forms of law, is appropriate to the case, and just to the parties to be affected. . . The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those rules established in our system of jurisprudence for the security of private rights."[1] Judge Cooley says "life, liberty, and property are representative terms, and are intended, and must be understood to cover every right to which a member of the body politic is entitled under the law."[2]

557. Amendment VIII.—This article is copied from the English Bill of Rights of 1688. Its provisions were incorporated in that celebrated document to protect the citizen against the oppression of government, and they were made a part of the American Bill of Rights for the same reason.

558. Limitations of the Foregoing Provisions.—With a single exception, all the constitutional provisions treated in this chapter

---

[1] Harlan *v.* Rec. Dist. No. 108. 111 U. S. 707.

[2] Story, *Commentaries on the Constitution*, § 1948-1950 (4th edition).

relate exclusively to the courts of the United States. Whether, under State laws, capital crimes shall be tried by juries, whether an accused person shall be twice put in jeopardy of life or limb, whether bail shall be excessive or punishments cruel or unusual,— it is for the States to say. The single exception is the clause quoted from the Fourteenth Amendment. This is the only instance in which the National Constitution has attempted directly to regulate the State judiciaries. The State constitutions, however, contain similar limitations upon State judicial power.

CHAPTER XXXVIII.

TREASON.

Article III.

559. The Crime of Treason.—Treason aims at the overthrow of the established government. It tends to unsettle and destroy the very foundations of civil society. It is a crime of which only a person owing allegiance to a government can be guilty. A man cannot be a traitor to a foreign country, unless he enlists in its army or becomes naturalized. Hence treason is regarded as the highest of crimes, and a traitor as the most odious of criminals.

The common law of England recognizes two kinds of treason. It is petit treason for a wife to kill her husband, or for a servant to kill his master; but high treason relates to the state, and includes attempting the life of the sovereign as well as waging war against him.

560. Abuses of the Punishment of Treason.—Tyrannical governments have taken advantage of the universal sentiment against treason to accomplish their own selfish purposes. In England, for example, the common law contained no definition of treason, and left large discretion to the courts to declare what acts were treasonable. The judges, who held their offices at the favor of the crown, sometimes proved themselves only too ready to serve the power upon which they were dependent. They invented constructive treasons; that is, by arbitrary construction of the law and by distorting facts, they made treason of offenses that were not so in reality. To put an end to such abuses required the vigorous interposition of Parliament, as well as the loud remonstrances of the people. Nor is it in monarchies alone that the power inherent in society to punish treason has been

abused. In the words of *The Federalist*, "New-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually worked their alternate malignity on each other." [1] To guard against such evils, the Convention inserted a definition of treason in the Constitution, and defined the mode of its proof, leaving nothing on either point to the discretion of either Congress or the courts.

Section 3, Clause 1.—Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

561. Levying War.—To levy war is to make war, an overt act. Chief-Justice Marshall has said: "War must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. . . . If a body of men be actually assembled for the purpose of affecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war." [2]

562. Giving an Enemy Aid and Comfort.—The second form of treason is not so easily defined. Aid and comfort may be given to an enemy in many different ways. However, for a citizen to sell the enemy of his country provisions, cannon, horses, ships, etc., to be used in the prosecution of war against it, or to render such enemy personal assistance, would be treason.

---

[1] No. 43.

[2] *Ex parte* Bollman, 4 Cranch 126.

563. **Modes of Conviction**.—In the modes prescribed for conviction, fear of the abuse of power is seen again. In the first mode of conviction two witnesses to the same overt act are essential. The clause also guards the accused against the consequences of his own confession, real or alleged; only confession in open court, that is, public confession when he is on trial, will be accepted as a basis of conviction.

On the last point Justice Story may be quoted: "It has been well remarked that confessions are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. To which it may be added, that it is easy to be forged, and the most difficult to guard against."[1]

Section 3, Clause 2.—The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

564. **The Punishment Declared.**—In 1790 Congress enacted that treason should be punished with death by hanging. In 1862 it enacted two modes of punishment, at the discretion of the court: the traitor should suffer death and his slaves be made free; or he should be imprisoned not less than five years, be fined not less than $10,000, and his slaves be made free, the fine to be levied on any property, real or personal, except slaves, that he might possess. In the second case the criminal should also be forever incapable of holding office under the United States. At present the punishment is death, or, at the discretion of the court, imprisonment at hard labor for five years and a fine of not less than $10,000, with the same disqualification as to holding office. Without this clause, Congress would have a perfect right to define the punishment of treason; and it was introduced, no doubt, to furnish an opportunity to limit the effects of attainder.

565. **The Common Law Punishment.**—According to

[1] *Commentaries*, § 1802.

the common law, a person adjudged guilty of high treason was drawn to the gallows, at first on the ground or pavement, afterwards on a sledge or hurdle; he was hanged by the neck and cut down alive; his entrails were taken out and burned before his face; his head was cut off; his body was divided into four parts, and his head and quarters were then placed at the king's disposal,— the whole proceeding being summed up in the phrase, " hanged, drawn and quartered."

566. **Attainder of Treason.**—According to the common law, a man found guilty of treason was said, by a figure of speech, to be *attinctus, attainted, tainted, stained, soiled,* and disgraced. The attainder or treason attached to the offender the moment that the judge delivered sentence of judgment upon him. By an extension of the figure, the attainder worked corruption of the blood of the person attainted, and also forfeiture of his estate.

The far-reaching significance of the old rules of law in relation to attainder, is well explained by Mr. Justice Story: " By corruption of blood all inheritable qualities are destroyed; so that an attainted person can neither inherit lands nor other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them to any other heir. And this destruction of all inheritable qualities is so complete, that it obstructs all descents to his posterity, whenever they are obliged to derive a title through him to any estate of a remoter ancestor. So that if a father commits treason, and is attainted and suffers death, and then the grandfather dies, his grandson cannot inherit any estate from his grandfather; for he must claim through his father, who would convey to him no inheritable blood. . In addition to this most grievous disability, the person attainted forfeits, by the common law, all his lands, and tenements, and rights of entry, and rights of profits in the lands or tenements, which he possesses. And this forfeiture relates back to the time of the treason committed, so as to avoid all intermediate sales and incumbrances; and he also forfeits all his goods and chattels from the time of his conviction."[1]

567. **Power of Congress over Attainder.**—The common law connected attainder with judgment of treason, and

[1] *Commentaries,* § 1299.

declared its consequences to be corruption of blood and forfeiture of estates. The Constitution leaves it to Congress to say whether attainder shall follow conviction or not, and if so what the consequences shall be; only the attainder shall not work corruption of blood or forfeiture except during the life of the person attainted. Congress has never included attainder in the punishment of treason, and the word is not found in our laws. An act to suppress insurrection, approved July 17, 1862, sometimes called the Confiscation Act, provided that the property of six classes of persons named, engaged in the rebellion or giving it aid and comfort, should be seized and confiscated and the proceeds applied to the support of the army of the United States. But the operation of this act was limited, as will appear below. The present law expressly declares: "No conviction or judgment shall work corruption of blood or forfeiture."

568. **Meaning of the Limitation.**—A question has arisen as to the phrase, "except during the life of the person attainted." This question is whether the phrase limits the time within which the corruption, or forfeiture, shall be worked, or the time that the forfeiture shall run in case there be one. Must the forfeiture be worked in the life of the traitor? Or shall the property of a traitor that has been confiscated, be restored to his heirs on his death? If the first be the meaning, then the dam imposed by conviction of treason would be removed by the death of the offender, and property could pass by, as from grandfather to grandson. The question has not been judicially determined, and is an open one.

In the case of real estate, President Lincoln understood the language in the second of the two senses. To meet his view, Congress adopted a joint resolution construing the act of July 17, 1862, as follows: "Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." The Supreme Court has sustained the act.

569. **Treason against a State.**—The Articles of Confederation did not recognize treason against the United States; all treason in that period was treason against a State. A motion to give Congress the sole power to declare its punishment was lost in the Convention,

so that the powers of the States to punish treason remained unchanged. Practically these powers have amounted to little; but Mr. Johnston well remarks that "they fasten the idea of allegiance to a State, and that carried into secession the multitude who disliked secession but dreaded to commit treason against the State."

Other provisions of the Constitution in relation to treason are discussed in connection with other subjects, as the subject of impeachment.

NOTE.—"No attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." "This limitation is understood by some to confine the corrupting and the forfeiting so as to require those acts to be done only while the traitor is alive; but it is generally understood to restrict the forfeiture in amount—to limit it to the life estate of the traitor—not affecting the title in fee. The courts seem to hold the latter view."—Waples, *Proceedings in Rem*, Chicago, 1882, 346. This author, however, contends that the first view is the correct one, or that the limitation is intended to prohibit what he calls "post-mortem forfeiting for treason," or the legal working of forfeiting after the traitor's death. The Supreme Court decided in Bigelow *v.* Forrest, 9 Wall. 339 that the act of July 17, 1862, and the joint resolution of the same date, must be construed together; also that under this legislation all that could be sold was the right to the property seized, terminating with the life of the person for whose offense it had been seized. In Miller *v.* United States, 11 Wall. 269, the court held that the confiscation acts of August 6, 1861, and July 17, 1862, were constitutional, and that, excepting the first four sections of the latter act, they were an exercise of the war powers of the government, not an exercise of its sovereignty or municipal power, and that, consequently, they were not in conflict with Articles V. and VI. of Amendments to the Constitution. The court did not say, however, as it was not called upon to say, in either of these cases, whether the first or the second view of the clause, on its merits, is the true one; the law and the resolution were agreeable to the second view and were constitutional, without reference to the question of whether Congress could have gone further or not.

CHAPTER XXXIX.

CONSTITUTIONAL LAW: THE JUDICIARY.

ARTICLE III.

REFERENCES.

Coxe, *Judicial Powers and Unconstitutional Legislation;* Davis, *Appendix to the Reports of the Decisions of the Supreme Court of the United States from September 24, 1789, to the end of the October term 1888* (United States Reports, No. 131; an important series of cases, decisions, and documents by the Reporter to the Supreme Court); Miller, *The Constitution of the U. S.*, Chaps. VII.-VIII.; Bryce, *The American Commonwealth*, Chaps. XXII.-XXIV. (Chapter XXIII. is an admirable statement of the way in which American courts were led to deliver constitutional decisions, and to set laws enacted by State legislatures and by Congress aside as null and void being in conflict with constitutions, State or National).

570. **The American Government Constitutional.**—The grand features of the American Government are delineated in written constitutions. These constitutions are the paramount law,— the Constitution of the United States of the whole country, and the constitutions of the several States of those States, save in so far as they are limited by the Constitution, laws, and treaties of the United States. All laws, National and State, are enacted with reference to these constitutions. Accordingly, what is called constitutional law, if it did not originate in the United States, has here reached its fullest development, and forms the peculiar feature of our jurisprudence. A constitutional objection to a measure in the United States is, that the measure conflicts with the paramount law; a constitutional objection to a measure in England amounts only to this,— the measure is a departure from the way in which things have heretofore been done.

571. Constitutional Decisions.—The supremacy of the Constitution over all laws, State and National, opens to the federal courts a field unknown to the courts of the Old World. They decide constitutional cases. The Supreme Court is called upon to decide cases involving the question whether a law of Congress is in conformity with the Constitution, and also cases calling in question the conformability of State laws to the Constitution, laws, and treaties of the United States. Once it was denied that the court had such powers, but it has asserted them, and the assertion has been sustained by the nation.[1] The State courts also pass upon the conformability of State legislation to the State constitutions.

572. Meaning of Unconstitutional.—Judge Cooley states the meaning of the word unconstitutional as follows: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto,* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."[2]

573. Exercise of the Power.—Obviously, to declare laws of Congress null and void is a responsible duty. The three branches of the government are of equal rank and dignity; each one is supreme in its own sphere, and invasions of the sphere of one by the others would soon destroy their harmonious working. This responsibility the Supreme Court has always felt. "It is an axiom of our jurisprudence," said Mr. Justice Swayne in 1866, "that an act of Congress is not to be pronounced unconstitutional unless

---

[1] Marbury *v.* Madison, 1 Cranch 137, and Cohens *v.* Virginia, 6 Wheaton 412.

[2] *Constitutional Limitations,* p. 222.

the defect of power to pass it is so clear as to admit of no doubt. Every doubt is to be resolved in favor of the validity of the law. Since the organization of the Supreme Court but three acts of Congress have been pronounced by that body void or unconstitutional." [1]

574. **A Case Must Arise.**—The Supreme Court cannot express its opinion as to the constitutionality of a law until a case arises fairly involving that question. For instance, in more than one hundred years it has not had an opportunity to declare the meaning of the phrase in relation to attainder, "except during the life of the person attainted." Should Congress enact a law for the punishment of treason making forfeiture of lands perpetual, and should a case arise under this law, then the court could give the phrase an authoritative interpretation. In 1857 it pronounced the Missouri Compromise unconstitutional, although this had been on the statute-book since 1820.

575. **Political Power of the Judiciary.**—The theory of the Constitution is that the three departments of the government are coördinate, each one being independent of the other two. Outside of the impeaching power, no department is amenable to either of the others. No power has been given to the courts to construe the Constitution for Congress or the President: each department must construe the instrument for itself. At the same time, judicial constructions of the laws and the Constitution directly affect the two political departments, as will be explained below.

1. The ordinary mode of enforcing the laws is by means of the courts; the courts reach men through their decrees and judgments; and the question whether they will withhold or grant these, makes the judges the interpreters of the law. If the court of final resort thinks a law unconstitutional, it will not enforce that law. Congress could reënact a law thus declared null and void, but the court would again refuse to enforce it. Nor would the government be apt to bring a second suit to enforce a law once pronounced null and void. This is a practical restraint upon both the legislature and the executive.

2. Congress and the executive naturally entertain great respect for the constitutional decisions of the Supreme Court: These de-

[1] U. S. *v.* Rhodes, 1 Abbot's U. S. Reports, 52.

cisions not only indicate what legislation the court will enforce, but they are also the decisions of men in independent position who are devoted to the study of such questions.

3. The public has great reverence for the court. Should Congress or the President come into collision with it, the public confidence would commonly go with the judges.

Accordingly, the decisions of the Supreme Court have a far-reaching significance. At the same time, it cannot always enforce its decrees. Its executive arm is the marshal; if this officer is not able to give them effect, he must call upon the President for aid, and if the executive fails in such a case, the court is powerless. Neither have the judges any power to enforce their decrees against the executive. Thus, in 1861, Chief-Justice Taney issued a writ of *habeas corpus* in the interest of a military prisoner at Baltimore; but President Lincoln refused obedience to the writ, and it fell powerless to the ground. States have also refused to obey the decisions of the court.

576. The Courts and the Development of the Constitution.—The national courts have played a great part in that development of the Constitution which has been dealt with in Chapter XIII. Mr. Bryce says this development has been effected in three ways.

"It has been changed by amendment." "It has been developed by interpretation, that is, by the unfolding of the meaning implicitly contained in its necessarily brief terms, or by the extension of its provisions to cases which they do not directly contemplate, but which their general spirit must be deemed to cover." "It has been developed by usage, that is, by the establishment of rules not inconsistent with its express provisions, but giving them a character, effect, and direction which they would not have if they stood alone, and by which their working is materially modified." Under interpretation he includes construction. "The process of development," he says, "shows no signs of stopping; nor can it, for the new conditions of economics and politics bring up new problems for solution. But the most important work was that done during the first half century, and especially by Chief-Justice Marshall during his long tenure of the presidency of the Supreme Court (1801-1835). It is scarcely an exaggeration to call him, as an eminent American jurist has done, 'a second maker of the Constitution.'"[1]

577. The National Judiciary.—No department of the government has more fully met the expectations of its authors than the judiciary. No department has commanded more confidence at home or more applause abroad. Its influence on the political and legal

[1] See the admirable chapters, XXXI.-XXXV.

development of the country has been very great. To quote Professor Johnston: "Unquestionably the most important creation of the Constitution was the Federal Judiciary. It will be seen that the only guaranty for the observance of the Articles of Confederation was the naked promise of the States. This had been found to be utterly worthless. The creation of a system of United States courts, extending throughout the States, and empowered to define the boundaries of Federal authority, and to enforce its decisions by Federal power, supplied the element needed to bring order out of chaos. Without it the Constitution might easily have proved a more disheartening and complete failure than the Articles of Confederation." [1]

NOTE.—The opinion commonly entertained hitherto is that the authority of our courts to declare laws unconstitutional, and so null and void, is purely of an inferential character. Those who have asserted most strongly that the Supreme Court of the United States has such power, have held that it is based upon implication and inference, and not upon the express meaning of the text, or any part of the text, of the Constitution. Mr. Brinton Coxe, in the learned work named above, has undertaken "to show that the Constitution of the United States contains express texts providing for judicial competency to decide questioned legislation constitutional or unconstitutional and to hold it valid or void accordingly." In examining this subject, he investigates "the history of the relation of judicial power to unconstitutional legislation in certain of the States before and during the Confederation," and seeks "to show that the judicial competency under discussion is an American institution older than the Constitution of the United States" pages (1, 2). It is well known to students that State courts began, almost as soon as the first State constitutions were ordained, to deliver decisions in which they set aside State legislation as in conflict with those instruments. A New Jersey case bears the date 1780, a Virginia case 1782, a New York case 1784, and a Rhode Island case 1786. The constitutional decisions of the National Supreme Court appear to have a still earlier prototype. Mr. Bryce remarks: "Questions sometimes arose in Colonial days whether the statutes made by these [Colonial] Assemblies were in excess of the powers conferred by the charter; and if the statutes were found to be in excess, they were held invalid by the courts, that is to say, in the first instance, by the Colonial courts, or, if the matter was carried to England, by the Privy Council." He states that "the same thing happens even now as regards the British Colonies" (Vol I., pp. 248, 249, text and note). Judge Swayne is quoted above to the effect that, down to 1866, only three laws enacted by Congress had been declared unconstitutional. Mr. Davis (see title above, pp. ccxxxv, *et seq.*) gives the titles of 20 decisions rendered by the court declaring United States statutes repugnant to the Constitution, and 171 decisions declaring State statutes so repugnant. Mr. Coxe subjects the first of these lists to criticism, and points out that it does not contain the famous Dred Scott decision (19 Howard 393). It is perhaps in some cases a difficult matter to determine whether a decision nullifies an act of Congress or not.

[1] *History of American Politics*, pp. 11, 12.

CHAPTER XL.

THE RIGHTS AND DUTIES OF STATES.

ARTICLE IV.

Section 1.— Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

578. Public Acts, Records, etc.—The public acts referred to are acts of the legislatures; the records are the records of wills, deeds, and legislative journals; the judicial proceedings are the orders and judgments of courts. For a State to give full faith and credit to the acts and records of another State, is to give to them the same credit that the State to which they belong gives them. This provision is obviously essential to the domestic peace and order of a federal union like the United States. Even the Articles of Confederation contained the same provision in somewhat different words.

Section 2, Clause 1.— The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

579. Privileges and Immunities.—Whatever privileges and immunities any State accords to its own citizens, it must accord to the citizens of other States who may happen to reside in it or visit it. A citizen of one State going into another cannot claim the privileges and immunities that he has enjoyed, unless they are also accorded by the State into which he goes to its own citizens. Inability to read is a bar to voting in Massachusetts and Connecticut, and an illiterate citizen moving into either of those States from Rhode Island or Vermont cannot claim the right to vote

because he has hitherto enjoyed that right. Still, civil and political rights are nearly the same in all the States. This provision was also contained in the Articles of Confederation, and is obviously necessary in a federal republic.

580. A Citizen Defined.—Previous to 1868 neither the national Constitution nor the national laws contained a definition of a citizen. The States made their own definitions, and there was more or less contrariety. Slaves were never citizens in any State; and Chief-Justice Taney, in the Dred Scott decision, denied that free negroes were ever citizens "in the sense of the Constitution." The fact is, however, that they were citizens, and even voted on the same terms as white citizens, in several States, when the Constitution was framed and for some time afterwards. Amendment XIV. contains this definition of citizenship: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." A citizen of the United States is not, however, necessarily a citizen of any State; he may reside in a Territory or in the District of Columbia.

Section 2, Clause 2.—A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

581. Fugitives from Justice.— The national authority embraces all the States, and it can, by its own officers, arrest offenders against its laws anywhere within the national boundaries. The treason of this clause is therefore treason against a State. A felony is a crime punishable by death or imprisonment. The jurisdiction of a State is limited by its own boundaries; a State can punish only offenses committed against its own laws; criminals often escape from one State into another; while the United States, save in cases of domestic violence, have nothing to do with enforcing State laws: hence there must be such a provision

as this if criminals are to be punished and society protected. It is copied from the Articles of Confederation almost word for word.

The surrender by one nation to another of a person charged with crime is known as extradition. This is not a right under the law of nations, but is commonly provided for between nations by treaty stipulations. The surrender of a criminal by one State to another under our system is also called extradition.

582. Surrendering Fugitives from Justice.—The Constitution says the demand for a fugitive from justice shall be made by the executive of the State from which he escapes, but does not say who shall make the surrender. There was some friction on this point until, in 1793, Congress legislated on the subject.

The procedure now is for the government making a requisition for a criminal to address it to the governor of the State to which the criminal has fled, distinctly stating the crime charged. The fugitive may be arrested and held in custody before the requisition is received, or made; but if not, then it becomes the duty of the governor receiving it to order his immediate arrest, and his delivery to the agent of the governor from whom the demand comes. The fugitive is then taken back to the State from which he fled for trial. The governor on whom such a demand is made has no right to go behind it to inquire into the merits of the case, but should obey the call; it makes no difference whether the offense charged be or be not a crime in the State where the criminal is found; still this rule is not always followed.

Section 2, Clause 3.— No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

583. Fugitives from Service.—The States authorizing slavery in 1787 could provide for the capture and surrender of all fugitive slaves found within their own borders, but not for the capture of those fleeing beyond their borders. Hence the introduction of this clause into the Constitution as a part of the third compromise. It applied as much to apprentices, or persons bound to service for a num-

ber of years, as to slaves, but it was inserted in the interest of slaveholders.

The clause in relation to fugitives from service is vaguer and more general than that in relation to fugitives from justice. It does not say how or by whom the capture or surrender shall be made. In 1793 Congress enacted a law for carrying the clause into effect, and in 1850 it enacted the law known as the Fugitive Slave Law, which was much more rigorous and efficient than the previous one. This law was one of the immediate causes that led to the election of President Lincoln to the Civil War, the Emancipation Proclamation, and the Thirteenth Amendment. Congress repealed the law of 1850 and the slave sections of the law of 1793 in 1864.

CHAPTER XLI.

NEW STATES: THE TERRITORIAL SYSTEM.

ARTICLE IV.

REFERENCES.

Hinsdale, *The Old Northwest* (the author shows how the Thirteen Colonies were constituted by the royal charters, Chaps. VI.-VII.; defines the Northwestern land claims, XI., and gives *in extenso,* XII., XIII., the history of the cessions); Fiske, *The Critical Period of American History* (Chap. V. deals particularly with the political bearings of the Western land question, and especially as a factor in the formation of the Constitution); Adams, *Maryland's Influence on Western Land Cessions to the United States* (this monograph deals particularly with the subject as related to the Articles of Confederation); Bancroft, Vol. VI., p. 277 *et seq.*

Section 3, Clause 1.— New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

Section 3, Clause 2.—The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

584. Western Land Claims.—At its formation, the American Union and the thirteen States were coextensive: there was no public domain. There were indeed large bodies of unoccupied lands on the Atlantic slope, and the Lake basin and the Mississippi valley were wildernesses, but these waste lands were all claimed by certain of the States as their individual possessions. The case stood thus: the boundaries of New Hampshire, Rhode Island,

New Jersey, Pennsylvania, Delaware, and Maryland had been fixed much as they are at present while they were still colonies; the chartered limits of Massachusetts, Connecticut, Virginia, North and South Carolina, and Georgia, which had originally extended to the South Sea, had been cut short at the Mississippi River by the treaty of 1763; New York claimed that she had acquired a vast Western domain by way of her connections with the Iroquois tribes. The result was that while six States (save alone Pennsylvania, which extended five degrees of longitude westward from the Delaware) were shut up to the seaboard, the other seven States collectively laid claim to the whole West.

585. **Western Cessions.**—The Western lands soon became the subject of a close controversy, which tended sharply to divide the States into two groups. Six claimant States pleaded their ancient charters, and New York her Iroquois connections, as good and sufficient titles to their claims. The six non-claimant States repudiated these titles and urged that, as the West must be wrested from the common enemy by the common effort, it should belong to the common country or the Union. Next to independence and the formation of a government adequate to the needs of the Union, the land question was the most formidable political issue of Revolutionary times. Moreover, it derived much of its importance from its intimate connection with both of those questions. It was greatly complicated also by conflicting boundaries and overlapping claims. A happy escape from the controversy was finally found in the surrender to the United States by the seven States of lands to which they laid claim, on the pledge given by Congress in 1780 that all lands so ceded should be disposed of for the common benefit of the United States and be settled and formed into distinct republican States, to be admitted to the Union on an equal footing with the old States. New York ceded in 1781, Virginia in 1784, Massachusetts in 1785, Connecticut in 1786. The Southern cessions were delayed; South Carolina's until 1789, North Carolina's until 1790,

and Georgia's until 1802. The first four cessions all lay northwest of the Ohio River, and they constituted the original public domain.

586. Division of Old States.—But this was not all. Vermont, which was claimed by both New Hampshire and New York, and partly by Massachusetts, had been clamoring for admission to the Union as a State since 1777. Kentucky already had a considerable population, among which there was a strong and constantly growing sentiment in favor of separation from Virginia and the assumption of the position of a new and independent State; and Maine, then a part of Massachusetts, had all the natural requisites for a separate State. The same may be said of Tennessee, which until 1790 was part of North Carolina.

587. Admission of New States.—There was therefore abundant territory belonging to the Union in 1787 out of which to form new States, and still more in prospect. The people of the old States had no thought of keeping this territory permanently in an inferior political position, but rather proposed to have it formed into new States as rapidly as its settlement would justify. Furthermore, the Vermont and Kentucky questions called for immediate settlement. Out of this state of facts grew the two clauses of the Constitution quoted above, which provide for the admission of new States and for the government of the national territory. But as controversies would arise, and in fact then existed, relative to the division of States, the provision was wisely inserted in regard to obtaining the consent of all the legislatures concerned as well as of Congress. Still further, the pending controversy as to the Southern cessions caused the insertion of the provision that nothing in the Constitution should be so construed as to prejudice any claim of the United States or of any particular State. Once more, settlements within the national domain were then beginning, and rules and regulations concerning lands and other matters were plainly needed, the making of which would naturally fall to Congress.

588. Territorial Growth.—These are the various acquisitions of territory by the United States:[1]

1. Louisiana, purchased of France in 1803, for $15,000,000, embraced the western half of the Mississippi valley and extended across the lower Mississippi River.

2. Florida, purchased of Spain in 1819, for $5,000,000, included the peninsula of that name, and a narrow strip of territory running westward along the Gulf of Mexico to Louisiana.

3. Texas originally claimed within its boundaries, besides the present State, so much of the Territory of New Mexico as lies east of the Rio Grande. It was admitted to the Union in 1845 by a joint resolution of Congress, having been previously a separate nation.

4. Oregon included the territory lying between parallels 42° and 49° north latitude west of the Rocky Mountains. The title to this acquisition is discovery and occupation, and treaties with Spain, Russia, and England, bearing the dates 1819, 1825, and 1846.

5. The first Mexican annexation embraced the country now owned by the United States south of parallel 42°, and west of the Rio Grande, except the second Mexican annexation. This was partly a conquest and partly a purchase from Mexico in 1848, the consideration being $15,000,000.

6. The second Mexican annexation, a strip of southern Arizona and New Mexico, sometimes called the Gadsden Purchase, was secured in 1853, for $10,000,000.

7. Alaska was purchased of Russia in 1867, for $7,200,000.

8. The Hawaiian Islands were annexed by a joint resolution of Congress approved July 7, 1898.

9. By the treaty of December 10, 1898, Spain ceded to the United States the island of Porto Rico and other islands in the West Indies, Guam in the Ladrones, and the Philippine Islands. At the same time she relinquished all claim of sovereignty over and title to Cuba. The United States paid Spain, according to the terms of the treaty, $20,000,000.

10. Part of the Samoan Islands, including Tutuila, were acquired by treaty with England and Germany, in 1900.

589. The Territory of the United States.—The territory of the United States is that part of the national dominion or territory which has not been formed into States. It is divided into organized and unorganized territories. The first are described in succeeding paragraphs; the second are directly subject to the laws of Congress. New Mexico.

[1] See Hinsdale, *How to Study and Teach History*, Chap. XX.

1850; Arizona, 1863; Oklahoma, 1890, and Hawaii, 1900, belong to the one class; Alaska and Indian Territory belong to the other. For the "dependencies," see 597.

590. **Ordinance of 1787.**—Preparations for settling the West and forming new States were already in progress in 1787. In 1784 Congress had adopted a Plan for the temporary Government of the Western Territory. But this proved inoperative, and was repealed three years later. In 1785 Congress adopted an Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, as far as they had been ceded by the States and by the Indian tribes. And July 13, 1787, it adopted the Ordinance for the Government of the Territory of the United States Northwest of the River Ohio. This celebrated ordinance, which was a sort of constitution for the Old Northwest, provided a territorial government, and established six articles of compact between the United States and the States to be carved out of the Territory, which should be of perpetual obligation. The fifth article of compact said there should be formed in the Territory not less than three nor more than five States, and defined their boundaries, which, however, were in some particulars subsequently departed from.

591. **The Northwest Territory.**—At the same time that the Federal Convention was framing the Constitution, and Congress the Ordinance of 1787, the Ohio Company of Associates, composed mainly of New England men who had served in the Revolutionary army, were making arrangements for forming a settlement in the Northwest. In fact, it was the representation made to Congress by this company, that it would buy and settle a large tract of the public lands, provided suitable terms were made and a suitable government established, that immediately led to the enacting of the ordinance. In pursuance of this arrangement a settlement was made at Marietta, Ohio, in 1788, and the Territory was fully organized July 15 of that year. Here our Territorial System had its beginning. At the basis

of this system lies a new and distinct idea. The Territories of the United States are quite different from the colonies of either ancient or modern times; the Territory is an inchoate State, and has been a powerful factor in the development of the nation.

592. **Types of Territorial Government.**—The Ordinance of 1787 gave the Northwest Territory a government that embraced these features: (1) There were a governor and three judges, first appointed by Congress, but later by the President and Senate; (2) these officers, in addition to their executive and judicial duties, were to frame a territorial code by selecting appropriate laws from the statute books of the States; (3) a territorial legislature should be elected as soon as the free male inhabitants reached 5,000, consisting of a house of representatives, chosen by the people, and a council, appointed by Congress or the President, from a list of candidates nominated by the house; (4) Congress should have a veto on all laws, whether selected by the governor and judges or enacted by the legislature; (5) the Territory, on reaching the population named, should have a delegate in Congress appointed by the legislature, with the right to speak but not to vote. This ordinance was the model of the early territorial governments.

The later type was less centralized and gave more power to the people. It consists of legislative, executive, and judicial branches fully developed. The legislature is chosen by the people; the governor and judges are appointed by the President and Senate, and are paid from the national treasury; the territorial delegate is elected by the people. The people are subject to certain special laws of Congress, but interests of a merely local character are regulated by local laws.

593. **Prohibition of Slavery in the Northwest.**—The Ordinance of 1784, as originally reported by a committee of which Mr. Jefferson was chairman, contained a prohibition of slavery in all the Western country, ceded or to be ceded, on and after January 1, 1801, but it was struck out of the bill on its passage through Congress. The Ordinance of 1787 revived the prohibition, but limited it to the Northwest and gave it immediate effect. Article VI. of compacts declares: "There shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted." And this clause was tacitly reaffirmed by Congress when, in 1789, it adapted the territorial government to the Federal Constitution. This prohibition became a precedent when slavery in the Territories became an absorbing political question at a later day.

594. Status of a Territory.—The status of a territory is distinctly inferior to that of a State. The people enjoy full civil rights, but their political rights are limited; their only representative in Congress is a delegate who cannot vote. They have no share in electing the President; they do not choose their own governor or judges; they are wholly subject to Congress, and have no political power or rights except such as Congress sees fit to give them; they come into the Union as a State only by the permission of Congress. The objects of a territorial government are to protect the people while it continues, and to prepare the Territory for statehood.

595. Requisites for Admission.—The Constitution commits the admission of new States wholly to the discretion of Congress. The history of the States admitted shows some diversity of practice in minor points. Congress determines the boundaries of new States formed from the public domain, fixes the time and manner of admission, and requires a constitution republican in form. No rule as to the size or population of a new State has at any time been followed. Many points of detail are settled in advance, some in the law organizing the Territory, and others in a special act called an Enabling Act, which authorizes the people to frame a constitution and apply for admission to the Union. In several cases, however, enabling acts have not been passed.

596. New States.—In all thirty-two new States have been admitted to the Union. Of the forty-five States, twenty-five lie within the United States as constituted by the treaty of 1783 (except that Alabama and Mississippi project south of the original southern line), while twenty have been formed out of the several annexations (except that Minnesota extends partly to the east of the original western line).

West Virginia was admitted in spite of special difficulties that have not been involved in any other case. Before the Civil War there were considerable divergencies of feeling and interest between the two sections of the State of Virginia, as divided by the Alleghany Mountains. These divergencies culminated at the beginning of the war; the people on one side of the mountains going with the South-

ern Confederacy, the people on the other remaining faithful to the Union. In April, 1861, a State convention at Richmond passed an ordinance of secession. In June following, a State convention at Wheeling, consisting mainly of delegates from the western part of the State, passed an ordinance declaring that the State officers who had become secessionists had vacated their offices, appointed a governor, and provided for the election of a new legislature. It also passed an ordinance submitting to a popular vote the question of erecting a new State to be called Kanawha. In October the people voted in favor of the new State, and at the same time elected delegates to a convention to frame a constitution. In April, 1862, the people adopted the constitution that the convention had framed. But this did not suffice; the national Constitution made the consent of the legislature of Virginia, as well as of Congress, necessary. So in May the legislature elected in pursuance of the call issued by the Wheeling convention the year before, composed of the representatives of the forty western counties but styled the legislature of Virginia, gave the formal consent of Virginia. Congress admitted the Senators chosen by the same legislature, and in December, 1862, passed an act to admit the new State on the adoption of a plan for the gradual abolition of slavery. In the course of these transactions the name Kanawha was dropped and West Virginia substituted. After the war, the legislature of Virginia acknowledged the validity of the formation of the new State.

597. Government of Dependencies.—By an act approved April 12, 1900, Congress created a temporary civil government for Porto Rico and the islands adjacent. The legislative assembly is composed of the house of delegates and the executive council. The members of the house of delegates, thirty-five in number, are elected biennially by the qualified voters of Porto Rico. The members of the executive council are appointed by the President by and with the advice and consent of the Senate, for the term of four years. The secretary, attorney-general, treasurer, auditor, commissioner of the interior, and commissioner of education of Porto Rico are *ex officio* members; the five other members are appointed primarily as members of the council and not as administrative officers. Five of the total number must be native inhabitants of Porto Rico. Besides acting as a house of legislation, this body is also an advisory council to the governor. The governor is appointed in the same manner as the members of the council, and for the same period. The judiciary consists of the municipal courts existing at the passage of the act and a United States District Court. The judges of the municipal district courts are appointed by the governor and council; the chief justice and associate justices of the municipal supreme court, as well as the

judge, district attorney, and marshal for the district of Porto Rico, by the President by and with the advice and consent of the Senate. The salaries of all officers, as well as the other expenses of the government, are paid out of the revenues of Porto Rico. The governor's salary is $8,000. The qualified electors elect a resident commissioner to the United States.

By an act approved July 1, 1902, Congress provided a plan for a temporary civil government of the Philippines. These islands, ceded to the United States in 1898, were first brought under the control of the military, but later the President sent out a Philippine Commission which by 1902 had established local governments in many places, and had taken charge of the general government there. The law of 1902 ratified the acts of this Commission, and continued its power until the new plan of government should be put in operation. The new plan includes a legislature consisting of two houses, the Philippine Commission of eight members appointed by the President of the United States, with the consent of the Senate, and a Philippine assembly elected by the people of the Philippines. The executive branch of the government is exercised by a Civil Governor appointed by the President and Senate, and by four other members of the Philippine Commission acting as heads of executive departments. The legislature has the choice of two resident commissioners to represent the islands at Washington. The supreme and municipal courts already established by the commission were continued by the law of 1903, but the appointment of judges of the supreme court was transferred to the President and Senate.

Cuba was not ceded in 1898, but the United States were to "occupy" the island, and while such occupation should last were to protect life and property, subject to the obligations imposed by international law. This military government of Cuba by the United States came to an end May 20, 1902, when the island was handed over to its own independent government.

CHAPTER XLII.

NATIONAL GUARANTEES TO THE STATES.

ARTICLE IV.

Section 4.— The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

598. The States Republican.—With certain limitations imposed by the national Constitution, the States are left free to organize their own governments in their own way. One of these limitations is that their governments shall be republican. A State can be suffered neither to set up a non-republican government for itself nor to continue under one imposed by another power. This is rendered necessary by the nature of the American system; a monarchical state in a federal republic would surely be an anomaly.

599. Congress to Decide.—The Constitution does not say what authority shall exercise this power of guarantee, or even define a republican government. The guarantee itself involves the power to decide all questions growing out of it. In 1841-42 there were in the State of Rhode Island two governments, each claiming to be established. In the celebrated case of Luther *v.* Borden,[1] which grew out of the controversy, the Supreme Court decided that this power resides in Congress. "And its decision [that of Congress] is binding on every other department of the government, and could not be questioned in a judicial tribunal."

600. Invasion and Domestic Violence.—Protecting a State against invasion and violence is protecting the Union itself; and it is the more reasonable that the nation should

[1] Howard 1.

furnish the protection because of the denial to the States of the right to keep ships of war and troops in time of peace. The laws make it the duty of the President to afford this protection, and they give him power to use the standing army and to call out the militia for this purpose. In a case of invasion, no application for protection is necessary; the President, as commander in chief, chooses his own time and mode of action; but in case of violence the procedure is very different.

601. Procedure in Cases of Violence.—Domestic violence is resistance to the law and authority of a State; to suppress it is first the duty of the State authorities. The President cannot even issue a proclamation commanding lawbreakers to disperse until a formal application has been made to him, unless the operations of the national government are interfered with.

The common mode of proceeding when State laws are resisted, is this: (1) the local police, as the sheriff and his posse, attempt to maintain order; (2) failing in the attempt, the sheriff calls upon the governor of the State for aid; (3) the governor, if in his judgment the emergency calls for it, orders out the State militia; (4) the militia failing, the governor, or the legislature if in session, makes an application for aid to the President, who (5) becomes the judge of the emergency. It is important to state, however, that if the insurrection in any way interrupts the operations of the national government, the President can, if he thinks necessary, at once send the national troops or call out the militia to put an end to such interruption.

602. Reasons for the Distinction.—The reasons for making the distinction between invasion and violence are obvious. Invasion is not only the more imminent peril, but it is also a direct challenge of the national authority. On the other hand, it is the duty of any government, as a State government, to enforce its own laws. A government that cannot ordinarily enforce its own laws but must rely upon another government to do so, is no government at all. It lacks the essential coercive element. Still more, a State would naturally resent all offers of unnecessary protection as an interference in its affairs: not to do so would be a

confession of weakness. Again, the frequent employment of the national forces by the President for such purposes, would tend to centralize power and perhaps to establish a military despotism. Hence the national government's power to interfere is limited by the requirement of a formal application for protection. The preference of the legislature to the governor as the authority to make the application, also arises from fear of centralized power.

603. Direct Relation of National Authority to Domestic Violence.—Still it must not be supposed that the national authority, in striking at domestic violence, pursues in every case the roundabout course that has been described. The President is sworn to see that the national laws are faithfully executed; and if public lawlessness in any way trenches upon those laws, if the operations of the government are in any way interfered with, then it is his right and duty to intervene, provided, in his judgment, such intervention is necessary. Ordinarily he will, in such case, like the governor of a State, look first to the civil processes of the courts; these failing, he will issue his proclamation commanding rioters or insurgents to disperse, and then, if he deems it necessary, he will send the national troops, or even call out the militia of the States, to maintain the public peace. The President can put soldiers on the mail cars to defend the mails, although he cannot put them on passenger cars to defend the lives of passengers, unless called upon by the State authority. President Lincoln acted in accordance with this power in issuing his proclamation of April 15, 1861. President Cleveland did the same in reference to the railroad riots in Chicago in June and July, 1894.

Replying to Governor Altgeld, of Illinois, who had complained that his action was unwarranted, President Cleveland said: "Federal troops were sent to Chicago in strict accordance with the Constitution and laws of the United States, upon the demand of the Post Office Department that obstruction of the mails should be removed, and upon the representation of the judicial officers of the United States that processes of the federal courts could not be executed through the ordinary means, and upon abundant proof that conspir-

acies existed against commerce between the States. To meet these conditions, which are clearly within the province of federal authority, the presence of federal troops in the city of Chicago was deemed not only proper, but necessary, and there has been no intention of thereby interfering with the plain duty of the local authorities to preserve the peace of the city." A case involving the powers of the national government in these emergencies was carried to the Supreme Court, which sustained the President and held: (1) that the government of the United States has jurisdiction over every foot of soil within its territory, and acts upon each citizen; (2) that it has full attributes of sovereignty over interstate commerce and the transmission of the mails; (3) that the powers thus conferred have been assumed and put into practical exercise by congressional legislation; (4) that in the exercise of these powers the government may remove natural or artificial obstructions to the passage of interstate commerce or the carrying of the mails.[1]

NOTE.—The fact that under our system of government the suppression of insurrection and domestic violence, or in other words the maintenance of public order, falls in the first instance upon the State rather than upon the Nation, has led to some serious diplomatic controversies. Reference may be made to the McLeod case, 1840-41 (See Lalor's *Cyclopædia*, "McLeod Case," and Curtis's *Life of Daniel Webster*, Vol. II.); also to the New Orleans riot of 1891, which resulted in the murder of a number of Italian subjects, and to the similar Colorado case which occurred in 1895, though these were of a very different character. The McLeod case, which came near involving us in war with England, led to the enacting of a law by Congress that, if such cases should thenceforth arise, they should be transferred from the State to the United States courts by writ of *habeas corpus*. The common usage of civilized nations requires one power to protect the lives and properties of unoffending subjects or citizens of other powers who are either temporarily or permanently within its territory. Moreover, the national government enters into treaty relations with foreign powers guaranteeing such protection; but under our system the practical guarantee is furnished by the States, not the Nation. The result is that when such subjects or citizens are not duly protected by the State authority, and the power having jurisdiction prefers a complaint or makes a demand for such protection at Washington, the National authorities have nothing to say, except that it is the duty of the States to maintain public order, and that they do not hold themselves responsible. The predicament is an embarrassing one. A foreign power knows nothing of the States, but does know the United States, and looks to them for redress. Mr. Blaine, Secretary of State at the time of the New Orleans riot, made the families of the murdered Italians a pecuniary compensation, taking the money from the contingent fund of the State Department. It will not be surprising if, as our foreign relations become more complicated, we shall think it wise to adopt some change in our policy in this particular.

[1] *In re* Debs, petitioner, 158 U. S. 564. See also 64 Federal Reporter, 724.

CHAPTER XLIII.

AMENDMENTS.

Article V.

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

604. Need of the Power.—Changes in the social conditions of a people, which are especially rapid in young and growing states, necessitate changes in the constitution as well as in the laws. At the same time frequent changes are undesirable, as they tend to keep the country in turmoil and to beget contempt for the Constitution itself. Writers on law teach, and experience confirms the teaching, that fundamental laws should be drawn in broad and comprehensive terms, and not be subject to easy changes. The Articles of Confederation were practically incapable of amendment, and this fact hastened the decline of the Confederation, and so made way for the present government. The Convention of 1787 guarded well both points of danger; it is not easy to amend the Constitution, but it is possible. During the many years that have passed since it went into operation, but nineteen amendments have been proposed, and but fifteen have been ratified.

605. Steps in Making an Amendment.—The steps in making an amendment are two in number, proposing and ratifying the amendment — the same steps that were taken when the Constitution itself was made. But the Constitution provides alternative modes both of proposal and of ratification.

1. Congress may propose amendments by the vote of two thirds of each house; or, secondly, whenever the legislatures of two thirds of the States make an application, Congress must call a national convention for that purpose. The first is much the more direct and simple mode, and it might seem that it is sufficient; but as Congress might refuse to propose amendments that were demanded by the popular will, the alternative mode was provided, thus making it possible to propose amendments to which one or both houses are opposed, and offering a means of escape from this danger. It has never been found necessary to call a convention for this purpose.

2. An amendment duly proposed must be ratified by the legislatures, or by the conventions, of three fourths of the States before it becomes binding. The Constitution itself was submitted to State conventions, because it was essential that the immediate representatives of the people, chosen for that sole purpose, should pass upon it, but in the case of amendments that is not necessary. In the resolution proposing an amendment, Congress designates that the ratifications shall be made by the State legislatures.

606. Limitations of the Power of Amendment.—The Convention provided that no amendment should be made previous to 1808 changing the conclusions that it had reached with so much difficulty in relation to the slave trade and direct taxes. The other limitation was far more important than these two. No State, without its consent, can be deprived of its equal suffrage in the Senate. Apparently, this limitation puts this feature of the national system beyond the possibility of change; it is the most permanent part of the Constitution.

607. Form of Amendments.—When the first amendments that were proposed were under discussion in the House of Representatives in 1789, there sprang up a difference of opinion as to the form which they should take. It was first proposed to insert them in the body of the Constitution in the natural places, but it was finally decided to add them as supplements. The form of proposal then adopted has since been followed, viz.: "Resolved, . . . that the following Articles be proposed as amendments to the Constitution, and when ratified by three fourths of the State legislatures shall become valid to all intents and purposes, as part of the same."

CHAPTER XLIV.

THE SUPREMACY OF THE UNION.

ARTICLE VI.

Clause 1.— All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

608. Validity of the Public Debt.—In the prosecution of the war against England, the Confederation had contracted a large public debt, partly domestic and partly foreign. While this debt would be as binding in morals and in international law against the new government as against the old one, since the change in no way affected the identity of the American people or the continuity of the national life, at the same time a formal assertion of its validity in the organic law could not fail to give confidence, particularly in those countries where the foreign debt was held.

609. Weak Point in a Federal System.—The weak point in every federal system is the relation of the local governments to the general government. It is the problem of securing at once both local freedom and independence, and national union and strength. The states are equal in rank, but if the national authority stands on the same level, the union exists only in name. If the system is efficient and permanent, the national jurisdiction must therefore be paramount. This point the Constitution protects by the following clauses:

Clause 2.— This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Clause 3.— The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath, or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

610. **The Supreme Law.**—No declaration could be more distinct and emphatic than the first of these clauses, that the national Constitution, laws, and treaties are the supreme law of the land. It makes this Constitution and these laws and treaties the paramount part of the State constitutions and governments. But the Federal Convention, not content with this declaration, provided practical safeguards of the strongest character.

611. **State Judges Bound.**—The judges in every State are bound by the national Constitution, laws, and treaties, no matter what the constitutions and laws of their particular States may contain. All State officers are required to take an oath to that effect; but there is peculiar propriety in singling out the judges, since they construe and declare the law, and so give effect to it by their judgments and orders. In every instance in which a State judge finds the State law in conflict with the national law, he must disregard the State and declare for the Union. Furthermore, he is bound by the decisions of the national courts in respect to the national Constitution and laws, and in respect to the State constitution and laws in so far as these involve federal questions. This provision tends to secure a consistent and uniform jurisprudence throughout the United States, as well as to maintain the supremacy of the national authority.

612. **The Oath Prescribed.**—The first law enacted by Congress under the Constitution was one prescribing the oath to be taken by national and State officers. In 1862 a very stringent oath, popularly called the "iron-clad oath," was prescribed for all officers under the general government, including Senators and Representatives. This act was applied in 1865 to attorneys practicing in the national courts, but the provision was declared unconstitutional by the Supreme

Court in 1866.[1] The act of 1862 has since been repealed. The oath of 1789 is: "I, A B, do solemnly swear, or affirm (as the case may be), that I will support the Constitution of the United States."

613. Limit of the National Supremacy.—The supremacy of the Union is limited to those powers and functions that are delegated to it by the Constitution. Within this sphere, it is all-powerful; beyond this sphere, it has no power whatever. The laws enacted by Congress are supreme so long as they are in force; when they are declared repugnant to the Constitution by the proper authority, they are null and void.

614. No Religious Test.—Governments having state churches have often required religious qualifications for holding offices or public trusts. The English Test and Corporate Act, passed in 1675, which included among its qualifications for entering on any municipal office a reception of the communion according to the rites of the Anglican Church, was not repealed until 1828. Jews were not allowed to sit in the House of Commons until 1858. The Lord Chancellor even now must be a Protestant. Similar tests were common in the colonies, and have also existed in the States. It was not until 1877 that New Hampshire struck from her constitution clauses requiring her governor and legislators to be adherents of the Protestant religion. The national Constitution makes religion an individual, and not a political matter, by establishing the widest tolerance. However, this rule has no application to the States. The Supreme Court has said: "The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States." [2]

---

[1] *Ex Parte* Garland, 4 Wallace 333.

[2] Permoli *v.* First Municipality, 3 Howard 589.

CHAPTER XLV.

THEORIES OF THE UNION: THE CIVIL WAR.

Mention has been made more than once in these pages of conflicting theories of the Union and the Constitution. The Strict-construction and Loose-construction schools have their favorite theories and phrases. To some extent, these controversies relate to names and words rather than to facts and ideas, but by no means wholly so. Two main lines of divergent thought can be followed from the very beginning of our present government.

615. **State Sovereignty.**—The theory of State sovereignty assigns to the State a paramount authority. It may be thus summed up. The Declaration of Independence was the work of thirteen peoples, and not of one people. It made the States as independent of one another as of England. The Confederation was the work of States as States, and so was the Constitution. It was framed by State delegates, ratified by State conventions, and created a government of expressly delegated powers. The States are therefore sovereigns; the citizen owes allegiance first to his State, and to the Union only so long as the State remains in the Union. The United States are not a nation in the sense that England or France is a nation, but a confederation or league. A State has the same right to recall the powers that it has delegated to the United States that it had to delegate them originally. It is as free to secede from the Union as it was to accede to it in the first place. Of the time and reason for such secession, the State is the absolute judge. Furthermore, if a State sees fit to exercise the right of secession, the Union has no legal or constitutional power of coercion. Such is the full-blown theory of State sovereignty; there is a milder one that we are not called upon to state.*

616. **Secession of the Eleven States.**—The theory of State sovereignty obtained general currency in the Southern States before the Civil War. Accordingly, when the election of President Lincoln, as they thought, endangered their rights in the Union, eleven States

seceded from the Union.[1] Such opposition as these acts of secession encountered within the States, was made mainly on the ground of expediency; few men ventured to deny the doctrine of State sovereignty. The ordinances of secession were enacted in most cases by State conventions, and but few of them were submitted to the people for their ratification. The South Carolina ordinance may be taken as an example. It simply professed to undo what had been done seventy-two years before.

"We, the people of the State of South Carolina, in convention assembled, do declare and ordain, and it is hereby declared and ordained, that the ordinance adopted by us in convention, on the 23d of May, in the year of our Lord 1788, whereby the Constitution of the United States was ratified, and all other acts and parts of acts of the general assembly of this State ratifying amendments of the said Constitution, are hereby repealed; and that the Union now subsisting between South Carolina and other States, under the name of the United States of America, is hereby dissolved."

The seceding States did not admit secession to be an act of revolution, like the Declaration of Independence, but asserted it to be a constitutional act. How naturally it sprang from the doctrine of State sovereignty is apparent at a glance.

617. **The National Theory.**—The national theory has been stated in various forms. The following is a summary of the statement made by Chief-Justice Chase in delivering the judgment of the Supreme Court in the celebrated case of Texas *v.* White, decided in 1869.[2]

The Union of the States is not, and never was, a purely arbitrary and artificial relation. It grew out of the common origin, sympathies, principles, interests, and geographical relations of the colonies. It was strengthened by the necessities of the Revolutionary War, and the Articles of Confederation solemnly declared it to be perpetual. Moreover, the Constitution was expressly ordained to form a more perfect union. But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual State existence, or of the right of self-government by the States. On the contrary, the preservation of the States and the maintenance of their

---

[1] The following are the States that seceded, with the dates of the ordinances of secession:

South Carolina	December 20, 1860	Texas	February 1, 1861
Mississippi	January 9, 1861	Virginia	April 17, 1861
Florida	January 10, 1861	Arkansas	May 6, 1861
Alabama	January 11, 1861	North Carolina	May 20, 1861
Georgia	January 19, 1861	Tennessee	June 8, 1861
Louisiana	January 26, 1861		

[2] 7 Wallace 700.

governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States. On becoming a member of the Union, any new State enters into an indissoluble relation. The union between such State and the other States is as complete, as perpetual, and as indissoluble as the union between the original States. There is no place for reconsideration or revocation, except through revolution or the consent of the States.

618. **Status of Seceding States during the War.**—While the national government was engaged in prosecuting the Civil War, and still more when the time came to reconstruct the Southern States, there arose wide differences of opinion as to the relation of these States to the Union. Congress never gave its sanction to any particular theory, but in the Reconstruction Acts, enacted over the President's vetoes in March, 1867, it laid down the conditions upon which the seceding States could be restored to their normal relations, and be admitted to representation in the two houses of Congress. In accordance with these acts, and subsequent supplementary ones, reconstruction was effected.

619. **Supreme Court View.**—In the case of Texas *v.* White the Supreme Court defines its view of secession substantially as follows:

Constitutionally considered, the ordinances of secession, and all the acts of the legislatures intended to give these effect, were absolutely null and void. But these States did not cease to be States, nor their citizens to be citizens of the Union. During the rebellion, they had no governments in the sense of the Constitution. The so-called governments were usurping governments, organized to carry on war against the United States. It was necessary that the governments and the people of these States should be restored to peaceful relations to the United States, under the Constitution, before they could claim the rights of States. The power to suppress insurrection and to carry on war, conferred by the Constitution, gave the nation authority to suppress the rebellion; and the power to guarantee to every State a republican form of government, also conferred, gave it authority to provide for the reëstablishment of legal State governments in the room of those that had been subverted and overthrown. This guarantee it was the duty and right of Congress to carry out. The power conferred by the guarantee clause, like other powers, carries with it a discretion as to the manner of its exercise. The governments organized in these States under the Reconstruction Acts are the constitutional governments of the seceding States. They are restored State governments, organized in allegiance to the Union for the benefit of the States.

620. The Antagonistic Theories.[1]—The theories of the Union described above were many years in course of formation. The early Strict-construction statesmen, who held the milder form of the theory of State sovereignty, contributed important ideas to the formation of the stronger form; but it was John C. Calhoun, more than any other man, who completed that theory and gave it currency. The national theory was mainly the work of Hamilton, Marshall, Story, and Webster. The Civil War was but the clash of these opposing theories; and the Supreme Court, in Texas *v.* White, merely summed up the results of the appeal to the court of war. The adjustment of the particular and general elements in our system is still the subject of discussion, and it will remain such as long as the federal system stands; but it is not easy to imagine a state of affairs as actually existing that could revive the old theory of State sovereignty. For example, the State of Mississippi has inserted this article in her bill of rights, adopted in 1890: "The right to withdraw from the Federal Union on account of any real or supposed grievance, shall never be assumed by this State, nor shall any law be passed in derogation of the permanent allegiance of the citizens of this State to the government of the United States."

NOTE.—President Lincoln, in his first message to Congress, referring to the "sophism that there is some omnipotent and sacred supremacy pertaining to a State," observed: "Our States have neither more nor less power than that reserved to them in the Union by the Constitution, no one of them ever having been a State out of the Union. The original ones passed into the Union even before they cast off their British colonial dependence; and the new ones came into the Union directly from the condition of dependence, excepting Texas. And even Texas in its temporary independence was never designated a State. The new ones only took the designation of States on coming into the Union, while that name was first adopted by the old ones in and by the Declaration of Independence. Therein the United Colonies were declared to be free and independent States; but even then the object plainly was not to declare their independence of one another, or of the Union, but directly the contrary, as their mutual pledge, and their mutual action before, at the time, and afterwards abundantly show. . . . The Union is older than any of the States, and in fact it created them as States. Originally some dependent colonies made the Union; and, in turn, the Union threw off their old dependence for them and made them States such as they are. Not one of them ever had a State constitution independent of the Union."

---

[1] A good statement of constitutional theories is given by Johnston. See Lalor's *Cyclopædia*, "Declaration of Independence," and other articles therein referred to.

CHAPTER XLVI.

RATIFICATION OF THE CONSTITUTION.

ARTICLE VII.

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

621. Reasons for this Article.—No amendment could be made to the Articles of Confederation, unless proposed by Congress and ratified by the legislatures of all the States. But the Convention that Congress called to its assistance in 1787, solely and expressly to revise the Articles of Confederation, and report such alterations and provisions therein as should, when approved by Congress and ratified by the States, render them adequate to the exigencies of government and the preservation of the Union, at once abandoned this plan, and took up the task of framing a new constitution. In this way the rules requiring the agreement of Congress to the Constitution, and a unanimous ratification, were avoided. A new constitution could prescribe its own rule of ratification. The Convention fixed upon nine States, the number required by the Articles for transacting business of first-class importance. Had the agreement of Congress and a unanimous vote of the States been necessary, the Constitution would never have been adopted. Still, the course taken in 1787 was in effect revolutionary, since it disregarded the provisions of the constitution already in force.

622. Status of States not Ratifying.—What would have been the status of States permanently refusing to ratify the Constitution? While the Constitution was under consideration, little was said about this delicate question. The

policy was, by argument and persuasion, to secure a unanimous ratification, if possible, and this policy fortunately proved successful.

It has been held that if Rhode Island and North Carolina had persisted in their first refusal to ratify, they would have become foreign nations. Practically this is an impossible view. Those States belonged to the Union that was formed in 1775; they had participated in the war of independence; the public debt was in part their burden; they held important territorial positions in the dominion surrendered by Great Britain in 1783. These facts precluded their being permitted to set up for themselves as independent nations. The logic of events compelled them to share the fortunes of their sister States. Congress began to give attention to these States soon after the two houses were organized in 1789. Ships belonging to their citizens were exempted from paying the duties levied on foreign ships, and Rhode Island asked for such an exemption. This was an implied acknowledgment on her part, as well as an assertion on the part of Congress, that Rhode Island was still one of the United States. In May, 1790, the Senate passed a bill forbidding commercial intercourse between that State and other States, and calling upon her for her share of the expenses of the war; the House delayed action, to see what the State convention that had been called would do. Had it been necessary, compulsion would no doubt have been ultimately employed against Rhode Island and North Carolina. Happily, their ratifications made this unnecessary.

CHAPTER XLVII.

THE BILL OF RIGHTS.

Amendments I.-X.

The several propositions relating to amending the Constitution before it should go into operation, have been stated in Chapter X.; also the plan adopted by its friends in Massachusetts, and in some other States, for effecting its ratification, which pledged them to favor amendments deemed necessary when the time came.

623. Ten Amendments Made.—When Congress, at its first session, took up the subject, it was found that Massachusetts had proposed 9 amendments, South Carolina 4, North Carolina 26, Virginia 20, New York 32, and New Hampshire 12; that minorities of the Pennsylvania and Maryland conventions had proposed 14 and 28 respectively; that Virginia had proposed a bill of rights containing 20 articles, and New York one of 24,— the whole making a total of 189 items. Many of them were repetitions, but there was still a large number of independent propositions. Twelve amendments, most of them selected from this mass, received a two thirds vote of each house, and were sent to the State legislatures for their action. Ten of the twelve received the required number of ratifications, and were declared to be in force, December 15, 1791.

Article I.— Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

624. No State Church, etc.—Congress has nothing whatever to do with churches or with religion as such. An

absolute separation of Church and State is one of the characteristic features of our Constitution. Then freedom of speech and of the press is another characteristic feature. It is to be observed, however, that these phrases are of necessity general and indefinite. Whether one has a right to utter his thoughts, depends on times and places, as well as on the thoughts themselves. The freedom of the platform or market-place cannot be tolerated in a garrison or camp. Words that are harmless or beneficial in time of peace, may be injurious in time of war. Mr. Hamilton said the liberty of the press could not be regulated by phrases or declarations, but "must depend altogether on public opinion, and on the general spirit of the people and of the government."[1] The right to ask that grievances be redressed, or the right of petition as it is called, is found in the old English charters; the colonists brought it with them from the old home; their descendants put it in the first State constitutions, and naturally desired to see it incorporated in the national Constitution.

The Sedition Law, enacted in 1798, forbade, under the penalty of a fine of not more than $2,000 and imprisonment of not more than two years, the publication or printing of any false, scandalous, and malicious writings of any sort against the government of the United States, either house of Congress, or the President, with intent to defame them, or to bring them into contempt, or to stir up seditions, or to encourage unlawful combinations against the government, etc. It was strongly opposed at the time as an abridgment of the liberty of speech and of the press, and it expired by limitation in 1801.

Article II.— A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

625. Right to Bear Arms.—Despotic rulers have generally been unfriendly to a citizen soldiery, rather preferring to rely upon regular troops. The friends of liberty, on the other hand, have commonly been unfriendly to large standing armies, and friendly to a citizen soldiery. One of the

[1] *The Federalist*, No. 84.

charges made against the king in the Declaration of Independence was that he had quartered large bodies of armed troops among the people. To deny the people the right of bearing arms, or even of having them in their possession, is one of the steps commonly taken by rulers seeking to establish or maintain arbitrary government. This article throws the safeguard of the Constitution around the militia of the States.

Article III.— No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

626. No Billeting of Soldiers.—The objects of billeting soldiers upon the people, as it was formerly called in England, were to compel those in whose houses they were billeted to support them, and at the same time to overawe and intimidate them and their neighbors.

Article IV.— The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

627. Freedom from Searches, etc.—Protection against unreasonable searches and seizures, the English people had through great effort and sacrifice, extorted from royal power. The maxim, "every man's house is his castle," was thoroughly grounded in the English constitution. The American colonists brought this immunity with them from the mother country; they cherished and protected it until the Revolutionary period, when they incorporated it in their State constitutions, and naturally desired to see it placed in the national Constitution.

[*Articles V., VI., VII., and VIII.* have been discussed in the chapters relating to the judicial department.]

Article IX.— The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

628. The Enumeration of Rights.—The Constitution

and Amendments expressly enumerate certain rights as reserved or retained by the people. Amendments I., II., III., and IV. are examples. The force of this article is that the particular enumeration of such rights shall not in any way be construed as meaning that other rights, not so enumerated, are surrendered or in any way impaired.

Article X.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

629. Powers Not Delegated.—As shown in Chaps. XII. and XXV., this article is a formal statement of the theory on which the national Constitution was framed, viz., a government of delegated powers. When it was under consideration in the House of Representatives, two motions were made to insert the word "expressly" before delegated, but both failed, showing conclusively that the House was unwilling to sanction the doctrine of express delegation, or to deny implied delegation.

630. Amendments I.-X. a Bill of Rights.—The foregoing amendments were proposed mainly with reference to the controversy about a bill of rights; they are a bill of rights *de facto,* although not so called. Some said at the time that they were of no value, since they secured rights never endangered. They satisfied, however, a popular demand, and several of them have proved practical restraints on the federal government. We are so little familiar with the acts prohibited, as the abridgment of the freedom of speech, establishments of religion, the quartering of soldiers in private houses, etc., that we but poorly appreciate at what cost these immunities were originally obtained by our English ancestors. The men of 1789, who had themselves passed through a struggle with arbitrary power, had a more vivid conception of their value.

631. Application of the Amendments.—It has sometimes been contended that several of these amendments apply to the States as well as the Nation. For example, it has been said that the Fifth Amendment extends to all

judicial tribunals in the United States, whether constituted by the Congress of the United States or by the States individually. This view is incorrect. Chief-Justice Marshall said of all the amendments made up to 1832, that they "contain no expression indicating an intention to apply them to State governments." And Chief-Justice Chase held, in 1868, that the Fifth and Sixth "were not designed as limits upon the State governments in reference to their own citizens, but exclusively as restrictions upon Federal power." [1]

[*Article XI.* has been quoted and discussed in dealing with the judiciary.

Article XII. has been considered in connection with the election of the President and Vice President.]

---

[1] Twitchell *v.* the Commonwealth, 7 Wallace 321.

CHAPTER XLVIII.

SLAVERY AND RECONSTRUCTION.

AMENDMENTS XIII.-XV.

632. Slavery, North and South.—Under the Constitution, slavery continued to decline in the North until it came to an end without shock or violence. In 1787 it was generally expected that such would be the result in the South also at no distant day, but new causes gave to history a wholly different direction. In course of time, the whole industrial system of the South was adjusted to slavery as a center, and this adjustment was followed, somewhat later, by the adjustment of politics to the same center.

633. Free and Slave States.—The question whether the virgin lands beyond the Alleghany Mountains should be devoted to slave labor or to free labor was raised as early as 1784. In 1787 Congress prohibited slavery throughout the Northwest Territory forever; but in the Territories and States organized south of the Ohio River it did not apply the same principle. At first there were seven Northern and six Southern States. Moreover, physical causes and the desire of statesmen to preserve what they called the "balance of the Constitution" tended to keep the numbers of free and slave States equal. In 1819 the balance was perfect, 11 to 11; moreover, up to that time slavery had not become a political, or at least not a sectional question.

634. The Missouri Compromise.—The feeling that no more slave States should be admitted into the Union, declared itself when Missouri applied for admission in 1818. The Missouri Compromise of 1820 embraced two main features; the admission of Missouri as a slave State, and the enacting of the following prohibition: "That in all that territory ceded by France to the United States under the name of Louisiana, which lies north of 36° 30′ north latitude, excepting only such part thereof as is within the limits of the State contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crime, whereof the party shall have been duly convicted, shall be, and is, hereby forever prohibited."

635. The Admission of Texas.—After 1820 the political significance of the names North and South became more definite. The

admission of Maine to the Union in 1820 balanced the admission of Missouri in 1821. Arkansas balanced Michigan. Florida gave the South the preponderance. But territory available for slave States was now used up; nothing remained south of the parallel 36° 30′ but the Indian Territory, which had already been dedicated to the Indian tribes. In the North, Iowa and Wisconsin were on the threshold of statehood, and southwest and west of those States lay a great region out of which numerous States have since been carved. This state of things Southern statesmen strove to meet by securing the admission of Texas to the Union in 1845.

636. **The Mexican Annexations and Wilmot Proviso.**—The annexation of Texas was shortly followed by the Mexican War, which closed in 1848 with a large annexation of Mexican territory. Again, in 1853, a second, though much smaller, annexation was made. Before the war closed, the following proposition was offered in the House of Representatives:

"Provided that, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, by virtue of any treaty which may be negotiated between them, and to the use by the executive of moneys herein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall be first duly convicted."

This proposition is known as the Wilmot proviso, from Mr. David Wilmot, of Pennsylvania, who offered it. Mexico had abolished slavery; and those who favored this proviso, as the majority of the Northern people did, desired to perpetuate the act so far as any Mexican territory coming to the United States was concerned. It failed, however, of adoption.

637. **The Compromise of 1850.**—Almost at once it became necessary to deal with the territory acquired in 1848. This was done, for the time, by the adoption of a series of measures known together as the Compromise of 1850, of which these are the chief provisions: the admission of California to the Union as a free State; the enacting of the Fugitive Slave Law; the prohibition of the slave trade, but not of slavery, in the District of Columbia; the payment to Texas of $10,000,000 for territory which she claimed northwest of her present boundary; and the organization of the Territories of New Mexico and Utah without slavery being either expressly prohibited or expressly permitted. The Compromise of 1820 was in no way disturbed. In these disputes was evolved the dogma called "popular sovereignty," according to which the question whether there should be slavery in any Territory should be left for the people of the Territory to settle for themselves.

638. North and South.—In these transactions the North and the South did not act as units. A number of men in the South always opposed the aggressive proslavery policy; a still larger number in the North opposed, or were indifferent to, the antislavery sentiment of that section. Political parties had never been organized with reference to slavery; thus the issue tended to become more bitter and more sectional, and parties and politics were national only so long as slavery was kept out of sight.

639. Repeal of the Missouri Compromise.—The bill for organizing the Territories of Kansas and Nebraska, approved by President Pierce, May 30, 1854, declared the prohibition of 1820 "inoperative and void, being inconsistent with the principle of non-intervention by Congress with slavery in the States and Territories, as recognized by the legislation of 1850, commonly called the compromise measures." The true intent and meaning of the Kansas-Nebraska Act was also declared to be "not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."

640. Position of Parties in 1856.—The new-formed Republican party disclaimed any intention of interfering with slavery in the States where it existed; but its first platform denied the right of any authority, whether of Congress or a territorial government, to give legal existence to slavery in any Territory of the United States, and declared also that the Constitution gave Congress sovereign power over the Territories, and that it was both the right and the duty of Congress in exercising this power to prohibit polygamy and slavery. On the other hand, the Democratic party put forth in 1856 a declaration for "Non-interference with slavery in the States and Territories, or in the District of Columbia." Slavery in the Territories now became the great political issue. Mr. Buchanan, the Democratic candidate for President, was elected on this issue in 1856.

641. Dred Scott Decision.[1]—In delivering the decision of the Supreme Court in the celebrated Dred Scott case, in 1857, Chief-Justice Taney denied that negroes had a legal existence as persons in the United States, or that they could sue in the national courts. He denied, also that Congress had supreme control over the Territories, and pronounced the Missouri Compromise of 1820 unconstitutional. Justices McLean and Curtis dissented. This decision tended greatly to intensify the antislavery sentiment of the North, as the Fugitive Slave Law had also done.

642. Presidential Election of 1860.—In the canvass of 1860

[1] Dred Scott *v.* Sandford, 19 Howard 528.

the Republican party stood united in opposition to the extension of slavery. The Democratic party, on the other hand, divided on the true intent and meaning of the non-interference principle. Both the Douglas and the Breckenridge wings agreed that Congress had nothing to do with the domestic institutions of the Territories and States; the people themselves, or the popular sovereigns, they said, must decide such questions. But when, and in what capacity, should the people assert their power? The Breckenridge platform said the people could exercise it only when forming a constitution for a State to be admitted to the Union, and that, in the meantime, all citizens of the United States had an equal right to settle in a Territory with their property of all kinds, without their rights of person or property being destroyed or injured by congressional or territorial legislation. The Douglas platform said, whether a territorial legislature could or could not prohibit slavery was a question for the Supreme Court to determine. The result of the election was that Abraham Lincoln, the Republican candidate, received 180 electoral votes out of 303, and was declared duly elected.

Now followed the secession of the eleven States, as related in a previous chapter.

643. **Emancipation Proclamation.**—In the North, slavery was generally considered the cause of the secession and the war, and the belief gained ground, as time went on, that the war could not be ended without destroying its cause. President Lincoln, who shared this belief, issued a preliminary proclamation, September 22, 1862, warning the inhabitants of the insurrectionary States that, on the first day of January, 1863, all persons held as slaves within any State or designated part of a State, the people whereof should then be in rebellion against the United States, should be then and forever free; and the executive government of the United States, including the military and naval authority thereof, would recognize and maintain the freedom of such persons. As the seceded States paid no heed to this proclamation, on the day named the President issued his Emancipation Proclamation, in which he designated Arkansas, Texas, Louisiana, except thirteen enumerated parishes, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia, except forty-eight counties (or West Virginia and seven enumerated counties in the eastern part of the State), as the States and parts of States which were in rebellion, and to which the proclamation applied, in accordance with the terms of the previous proclamation.

The Emancipation Proclamation was a war measure; no one pretended that the President could have issued it in time of peace. It ran: "I, Abraham Lincoln, President of the United States, by virtue

of the power in me vested as commander in chief of the army and navy of the United States, in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do," etc.

644. Amendment XIII.—President Lincoln's proclamation left slavery undisturbed in Maryland, Delaware, Kentucky, Tennessee, and Missouri, and in parts of Virginia and Louisiana. To these States and parts of States his power as commander in chief did not extend, as they could not then be considered to be in rebellion. But the conviction that slavery should come to an end with the war continued to spread. So Congress — the Senate, April 8, 1864, and the House of Representatives, January 31, 1865 — proposed an amendment in these words:

ARTICLE XIII.

"*Section 1.*—Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"*Section 2.*—Congress shall have power to enforce this article by appropriate legislation."

Secretary-of-State Seward issued his certificate December 18, 1865, announcing that the amendment had received the ratifications of the requisite number of States, and declaring it valid as a part of the Constitution. The first section calls for no comment; of the second one it may be said, as of the similar sections found in the two succeeding amendments, that they are mere surplusage, as Congress would possess such great power without a formal delegation.

In his certificate, Mr. Seward named twenty-seven of the thirty-six States as having ratified the amendment, just three fourths. Eight of these had seceded; they had formed new State constitutions under the proclamations of Presidents Lincoln and Johnson, but not one of them was represented in Congress, and not one had Congress declared restored to the Union. Subsequently, Congress declared these eight States, and two others, in a state of insurrection. Hence the validity of the ratification was sometimes questioned. Two re-

plies have been made to the objection: first, that the nineteen loyal States that ratified were three fourths of the States of that class, and that these were all the States that should be consulted; second, that Congress had not, at the time, declared the ten States in insurrection, and that the subsequent act was not retroactive. The amendment, however, was sent to all the States indifferently. In connection with the first answer it may be remarked that the first ten amendments did not receive the ratification of three fourths of the thirteen States, but only of the eleven that had ratified the Constitution at the time of their adoption. Four loyal States ratified Amendment XIII. after Mr. Seward's certificate was issued.

645. Amendment XIV.—The Fourteenth Amendment, which was a part of the plan of reconstruction then favored by a majority of Congress, was proposed June 16, 1866. Its ratification by the ten States that were declared in insurrection in March, 1867, was made a condition of their being formally restored to the Union. By July 20, 1868, six of these States and twenty-three others had given their ratifications, although Ohio and New Jersey had subsequently withdrawn theirs. Twenty-nine States are three fourths of thirty-seven States, but twenty-seven are not. Secretary Seward, on the date last given, issued his certificate reciting the facts, and stating that the amendment had been ratified, provided the ratifications of Ohio and New Jersey were to be counted, a point that he had not, he said, legal power to decide. Congress immediately adopted a concurrent resolution declaring the amendment ratified, and a part of the Constitution, and instructing the Secretary to issue a certificate to that effect. This he accordingly did July 28, 1868. Subsequently other ratifications were given, making thirty-three in all.

Section 1.—All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

646. Citizenship Defined.—This clause is a denial of

the principle on which the Dred Scott decision rested, viz., that a negro could not be a citizen of the United States. The Civil Rights Act of April, 1866, had declared the right of colored persons to citizenship; but as this was only opposing an act of Congress to a decision of the Supreme Court, it was deemed advisable to declare, by constitutional provision, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States and of the State wherein they reside. The privileges or immunities of the citizens of the United States cannot be readily catalogued; but legal protection of life, liberty, and property, the right to form family relations, the right to exemption from unequal taxation, to choose one's profession, and to the use of the courts of law, are unquestionably included. The suffrage is a political and not a civil right.

647. **Due Process of Law.**—The effect of the provision in relation to due process of law, is that these rights are placed under the protection of known and established principles and maxims. Life, liberty, and property are representative terms and cover every right to which a member of the body politic is entitled under the phrase "the equal protection of the laws." It is not understood that this phrase relates to class distinctions that are founded in nature and reason, but only such as are purely arbitrary. "It is a formal declaration," says Judge Cooley, "of the great principle that has been justly said to pervade and animate the whole spirit of our constitution of government, that all are equal before the law."

The Supreme Court has refused writs of *habeas corpus* asked for to stay the execution of criminals condemned to death by the use of electricity under a law of New York prescribing that mode of punishment in capital cases. In Kemmler's case[1] the petition for the writ was put on the ground that since the punishment was cruel and unusual, the execution of the sentence would be in contravention of the clause that "no State shall deprive any person of life, liberty, or

[1] *In Re* Kemmler, petitioner, 136 U. S. 436.

property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The court held that the statute was not repugnant to the Constitution. The Chief Justice said burning at the stake, crucifixion, breaking at the wheel, or the like, would be cruel punishments within the meaning of the Constitution. The court also held that Amendment VIII. has no application to State jurisprudence. The courts of New York have also decided that the proposed punishment is not cruel or unusual.

Section 2.—Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

648. Reason for the Section.—In 1868 negroes were denied the suffrage in nearly all the States, North as well as South. The statesmen controlling Congress at that time believed that this was a situation that boded ill to the colored race, especially in view of the recent emancipation of the slaves. The whites, it was feared, would discriminate against the negroes, and it was held to be the duty of the national government to see that they were protected in their civil rights. According to American ideas, the direct road to such protection is the right of voting. But the regulation of the suffrage had always belonged to the States; there was also a widespread prejudice against conferring it on colored men at all. So this clause was devised, in the expectation that the Southern States, rather than submit to a large reduction of their representation in the House of Representatives and in the electoral college, would grant the suffrage to colored men. The clause offered the Southern States a strong political inducement to give the negro the vote; not one of them complied with the condition;

but as the next apportionment of Representatives was not made until Amendment XV. had been declared in force, the clause has never had the slightest effect. Nor is the first sentence of the section anything more than a formal declaration of the rule of apportionment since the three-fifths rule ceased to operate.

Section 3.—No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

649. Object of the Section.—The effect of this section was to put the political and military leaders of the Southern Confederacy under a temporary disability to hold office. Congress has often legislated on the subject. The general Amnesty Act passed in 1872 removed the disabilities from all persons save Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military, and naval service, and foreign ministers. Many of these excepted persons, however, were afterwards relieved of the disabilities by special acts of Congress. Finally, in 1898, Congress removed the disabilities from all persons on whom they had theretofore been imposed.

Section 4.—The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

650. Objects of the Section.—In 1866 it was feared that efforts might be made (1) to repudiate the national debt

created to carry on the war; (2) to pay the Southern war debt; or (3) to pay for the slaves that had been emancipated. Hence the incorporation of the foregoing prohibitions in the Constitution.

Section 5.—The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

651. Amendment XV.—When the Constitution went into operation in 1789, persons of color voted in several of the States. Subsequently the right was denied in nearly all of the States, and this was the situation in 1866. It was soon seen that the indirect plan of securing such persons the suffrage (Amendment XIV., section 2), would either fail wholly of accomplishing its purpose, or would be a long time in doing so. Congress accordingly proposed, February 27, 1869, a new amendment to reach that end directly. Thirty of the thirty-seven States having duly ratified it, Secretary Fish issued his certificate declaring it in force, March 30, 1870. This Fifteenth Amendment is in these words:

Section 1.—The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

Section 2.—The Congress shall have power to enforce this article by appropriate legislation.

652. Effect of Amendments XIII.-XV.—The circumstances under which the last three amendments were incorporated into the Constitution were not favorable to a careful consideration of their real import and probable effect. They were adopted to prevent existing evils, and how far-reaching they might prove to be, was not maturely considered. Even those members of Congress who agreed in desiring to make another such struggle as the Civil War impossible, by no means agreed as to the immediate or ultimate effect of these amendments. Hence, when the amendments had become parts of the Constitution, the questions arose at once: How far have they weakened the States? How far have they strengthened the Union? These questions have since been passed upon, in their general features, by the United States Supreme Court. In the Slaughterhouse cases the court said:

"We do not see in those amendments any purpose to disturb the

main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States, with powers for domestic and local government, including the regulation of civil rights—the rights of person and property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation."[1]

And Mr. Justice Miller, commenting upon the decision, has said: "The necessity of the great powers conceded by the Constitution originally to the federal government, and the equal necessity of the autonomy of the States and their power to regulate their domestic affairs, remain as the great features of our complex form of government."

653. **Civil Rights Acts.**—Soon after the Thirteenth Amendment was declared in force, Congress passed the first of that series of acts known as the Civil Rights Acts, with a view "to protect all persons in the United States in their civil rights." The last of these acts, bearing date March, 1875, declared, section 1:

"That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

The succeeding section imposed penalties for violations of the rights here enumerated, and prescribed legal remedies. It is clear that if the new amendments authorized such legislation as this, then they had fundamentally changed the nature of the government. But in the Civil Rights cases,[2] decided in December, 1882, the Supreme Court held that this legislation was unconstitutional so far as it related to the States.

654. **Amendments Proposed but not Ratified.**—Of proposed amendments that have not been ratified there are four. The first of these was proposed in 1789, and related to fixing the compensation of Senators and Representatives; it is quoted in a footnote on page 183. The second one was proposed in 1790, and related to the apportionment of Representatives; it may be found on page 150, in the footnote. The third was proposed in 1809, and related to the acceptance of titles of nobility and presents by citizens of the United

[1] 16 Wallace 36.
[2] 109 U. S. Reports 3.

States; it is quoted on page 242. The last one, sometimes called from its author, Hon. S. A. Douglas, "the Douglas Amendment," proposed in 1861, was in these words: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."

PART III.

THE STATE GOVERNMENTS.

CHAPTER XLIX.

RELATIONS OF THE STATES TO THE UNION.

REFERENCES.

Some references bearing on State governments have been given in Part II. Attention may again be drawn to Cooley's *Constitutional Limitations,* which is the great authority on State constitutional law. For the rest, it seems better to give references in connection with the several chapters when references are called for.

655. National Constitution Half a Political System.—Our examination of the federal government shows very clearly that it is but half a political system. No state could exist a day with such an imperfect government as this. The explanation of what might strike a foreigner as a strange anomaly, is that the important powers that the Constitution omits had already been intrusted to a series of secondary jurisdictions called the States.

656. The Union Dependent on the States.—The Constitution of 1787 enlarged the sphere of the national government, and gave it power to act directly upon the people irrespective of the States. But it is still necessary for the States to assist in keeping the machinery of this government in motion, as well as to exercise their own proper powers. The Constitution assumes: (1) that the legislatures will fix qualifications for the electors of Representatives; (2) that the States will conduct or manage the elec-

tions of Representatives; (3) that the legislatures will elect Senators; and (4) that each State will appoint presidential electors. Plainly, if the States should fail to perform these duties, or any of them, the national system would fall into ruins. Here the national government has no coercive power whatever. Hence the State governments are part and parcel of the national government; or, as Judge Jameson puts it, "The constitutions of all the States form a part of the constitution of the United States." [1]

657. Proper State Sphere.—But, important as are the national functions performed by the State, they do not determine the proper State sphere, but are only incidental and secondary. The real sphere of the State is the exercise of those powers of government which are not delegated to the Nation or forbidden to the State. These powers have been treated with some neglect both by practical politicians and by students of political science. The causes are obvious: in the division of powers made by the national Constitution, the more imposing ones were assigned to the Nation, the less imposing to the States; National politics have grown at the expense of State politics; Washington is a larger political theater than Albany or Columbus.

658. Relations of the Citizen to the Two Jurisdictions.—Important as the powers of the Nation are, the common citizen, in time of peace, has few relations with it outside of the Post Office Department, while his relations with the State are numerous and constant.

Said President Garfield in 1871: "It will not be denied that the State government touches the citizen and his interests twenty times where the national government touches him once. For the peace of our streets and the health of our cities; for the administration of justice in nearly all that relates to the security of person and property, and the punishment of crime; for the education of our children, and the care of unfortunate and dependent citizens; for the collection and assessment of much the larger portion of our direct taxes,

[1] *The Constitutional Convention*, pp. 87, 88.

and for the proper expenditure of the same—for all this, and much more, we depend upon the honesty and wisdom of our General Assembly [of Ohio], and not upon the Congress at Washington."[1]

Mr. Woodrow Wilson, discussing the same subject, says the twelve greatest subjects that occupied the public mind of England in the nineteenth century were Catholic emancipation, Parliamentary reform, the abolition of slavery, the amendment of the poor laws, the reform of municipal corporations, the repeal of the corn laws, the admission of the Jews to Parliament, the disestablishment of the Irish Church, the alteration of the Irish land laws, the establishment of national education, the introduction of the ballot, and the reform of the criminal law. And all of these except the corn laws and the abolition of slavery would have been, under our system, so far as they could be dealt with at all, subjects for State regulation exclusively.[2]

---

[1] *Works*, Vol. I., p. 733.

[2] *The State*, p. 487.

CHAPTER L.

STATE CONSTITUTIONS.

REFERENCES.

Jameson, *The Constitutional Convention*, particularly Chap. IV.; Hitchcock, *American State Constitutions;* Poore, *The Federal and State Constitutions, etc.*

The origin of State constitutions was treated in Chapter IV. More definitely, the following topics were considered: Independence, the Colonies Reorganized as States, the First Constitutions, Source of the New Constitutions, Models of the New Constitutions, the Transition from Colony to State. Only one of these topics calls for fuller treatment.

659. The First Constitutions.—The first State constitutions were framed by State conventions and congresses, some of them composed of members of the legislatures, and some of them composed of men especially elected for that purpose. The constitution of Massachusetts was the only one submitted to the people for ratification. Connecticut and Rhode Island, finding the charters granted by Charles II. in 1662 and 1663, sufficient for their purposes, did not frame constitutions until 1818 and 1842.

The following are the dates of the constitutions of the eleven other States:[1]

New Hampshire, January 5, 1776.
South Carolina, March 26, 1776.
Virginia, June 26, 1776.
New Jersey, July 3, 1776.
Delaware, September 21, 1776.
Pennsylvania, September 28, 1776.
Maryland, November 11, 1776.
North Carolina, December 18, 1776.
Georgia, February 5, 1777.
New York, April 20, 1777.
Massachusetts, June 15, 1780.

[1] With a single exception, the above dates are given on the authority of Poore. He does not tell us when the constitution of Massachusetts took effect.

Hastily formed as most of these constitutions were, and the first of their kind, it would have been strange indeed if some of them had not proved to be very defective. Such was the case. The public dissatisfaction is shown by the early action of States either to amend their constitutions or to form new ones. South Carolina adopted a new one in 1778, New Hampshire in 1784, Delaware in 1792, Georgia in 1798, Pennsylvania in 1792, while Maryland amended hers the next year after its adoption. Measured by this test, the constitution of Massachusetts was the most nearly perfect of all; it was not amended until 1820 and is still in force. New York adopted a second constitution in 1801, Virginia in 1830, North Carolina in 1834, New Jersey in 1844.

660. The Later Constitutions.—As a class, the later constitutions differ from the earlier ones in several features, of which the following may be particularized:

1. They are framed by constitutional conventions, or constituent assemblies, duly convoked and elected for that purpose. The first constitutions were all revolutionary acts.

2. They are usually submitted to the people for ratification by a popular vote.

3. They are much more elaborate and complete. This is partly due to the increased complexity of government growing out of the increased complexity of society. For the rest, it may be attributed to popular jealousy of authority, and to a desire so to limit and qualify the powers of government as to prevent abuses.

The following information is furnished by the Office of the Attorney-General of that State. A constitution framed by the General Court of 1777-78, acting as a constituent assembly, was submitted to the people and rejected. In September, 1779, a convention of delegates chosen by the people met at Cambridge for the purpose of drafting a constitution; it seems to have adjourned in November, and then to have met March 2, 1780, when it passed a resolution submitting to the people the draft of constitution that had been drawn up. Between that date and June 14 following, an election was held; and on the 15th of that month the convention resolved "that the people of the State of Massachusetts Bay have accepted the constitution as it stands in the printed form submitted to their revision." I have assumed that the constitution took effect with the adoption of this resolution.

661. Amendments.—The State constitutions make provision for their own amendment. This involves the two steps of proposal and ratification. The first step is usually taken by the legislature; in some States a majority, in some three fifths, and in some two thirds of all the members-elect are necessary for this purpose. A few States require the concurrence of two successive legislatures. As a rule, the ratification is by the popular vote; in some States a majority of all the votes cast at the election is required; in some, a majority of those cast on this particular question suffices. In Delaware the ratification is given by the legislature succeeding the one that proposed the amendment. The legislature of New Hampshire cannot propose amendments, but it may submit to the people the question of calling a convention to do so.

662. Constitutional Conventions.—Many of the constitutions provide for calling constitutional conventions. Some legislatures are required to submit that question to the people at stated periods: in New Hampshire, once in 7 years; in Iowa, once in 10; in Michigan, once in 16; and in New York, Ohio, and Maryland once in 20. All constitutions framed by such conventions, and all amendments proposed by them, as well as those proposed by legislatures, must then be subjected to the constitutional method of ratification.

663. Limitations of the State Governments.—As stated in Chapter XII., the State governments possess inherent powers; the federal government, delegated powers. It must also be borne in mind that the American people did four things when they ordained the national Constitution: they delegated certain powers of government to the Union; prohibited certain powers to the Union; prohibited certain powers to the States; reserved all powers that they had not delegated to the Union, or prohibited to the States, to the States, or the people,—thus making the States their residuary legatees. Still it must not be supposed that the State governments possess or exercise all the reserved

powers. The reservation is made to the people of the States, not to the State governments; and the people, in the State constitutions, deny such reserved powers to their State governments as they see fit. From the first, the people have withheld powers from the governments that they have constituted, and in later years they have withheld more such powers than formerly. Thus, the States might establish State churches, deny to citizens the right of petition, or the right to bear arms, and unduly limit, or even deny, the right of trial by jury; but the State constitutions carefully guard these points and many more besides. For example, the Pennsylvania bill of rights closes with this declaration: "To guard against transgression of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate."

664. Scope of the Present Inquiry.—It is neither possible nor desirable in the present work to examine in detail all the forty-five State constitutions, or even any one of them. The full discussion of the national Constitution renders that superfluous. A general statement of the nature and operation of the State governments, with some account of the principal variations, will amply suffice for the present purpose.

665. Three Departments.—The States all preserve the old three-fold division of governmental powers and departments, and it constitutes the main framework of their constitutions. The national Constitution, by devolving certain duties upon the legislatures and governors, makes this three-fold division necessary; a State without it would not have a republican form of government within its meaning.

666. Assumptions of the Constitution.—The national Constitution assumes, and so indirectly ordains, various features of the State governments. Moreover, by assuming the existence of these features and by devolving upon legislatures, governors, and judges certain definite duties, the Constitution makes them, *de facto,* a part of the machinery

of the national government, and so declares, by implication, that they shall continue. No State, therefore, could abolish its legislature, governor, or courts of law. To do so would bring it into collision with the national authority. And this also is a pledge that the government of every State must be republican.

667. **Bills of Rights.**—Most if not all of the State constitutions contain, frequently as a preface, a series of propositions bearing the name, Bill of Rights, or at least answering to this description. The practice dates from Revolutionary times, as has been explained in a previous chapter. Some of these propositions are merely general political maxims, or abstract statements of rights, first copied from their English prototypes, but many of them are special and concrete. It is in these bills that many of the limitations imposed by the people of the States upon their governments are enumerated. Mr. Bryce observes, and very properly, a growing tendency on the part of the people to place less reliance upon general maxims, and more reliance upon specific declarations.

668. **Fluctuations of State Constitutional Law.**[1]—Upon the whole, the State constitutions have proved to be much less fixed and stable than the Federal Constitution. In 1860 there were 34 States; and only 5 of the number, none more than 15 years old, still retained their first constitutions unchanged. All the others had not indeed thrown aside their first constitutions, but they had all either thrown them aside or subjected them to more or less amendment, and often to repeated amendment. Up to that time 69 complete constitutions and 101 different sets of amendments had been promulgated. From 1860 to 1886 the new constitutions were 35, including the first ones of 4 new States; and the number of amendments, longer and shorter, counting as one amendment whatever was adopted at one time, were 114. In other words, from 1776 to 1886 we count 104 complete constitutions and 215 amendments. This is not counting constitutions and amendments proposed that failed to receive ratification. In the last ten years of the period, 6 complete constitutions and 28

[1] Jameson, *The Constitutional Convention*, Chap. VII.; Hitchcock, *American State Constitutions*, pp. 15-17; Bryce, *The American Commonwealth*, Vol. I., pp. 456, 457.

amendments were rejected by the popular vote. Previous to 1873, as many as 152 conventions had sat for the purpose of framing, devising, or ratifying constitutions. Seven new States have been admitted to the Union since 1886; several of the old States have adopted new constitutions, and many more have adopted amendments, so that the process of elaborating State constitutional law shows no sign of coming to an end. It must be said that this process goes on much more rapidly in some sections of the country than in others. This is particularly true of the South and West. Louisiana, Georgia, South Carolina, and Virginia have each had 6 constitutions; Pennsylvania, New York, and Delaware, 4; Illinois, 3; Ohio, Michigan, New Hampshire, and Vermont, 2; Rhode Island, Connecticut, Maine and Massachusetts, 1. Still, some of the constitutions that have stood longest have been considerably, and often materially, changed by amendment. The causes of this continued flux of State constitutional law are not far to seek. The State constitutions are regarded with much less reverence than the Federal Constitution; the machinery that is provided for their amendment is much less cumbersome and much more easily operated; and State opinion often depends directly upon new communities or communities where society has never assumed as regular and settled a form as it has in the whole country taken together.

The increasing size of the State constitutions is well shown by the amount of space that they occupy in Poore's ample pages. Four constitutions of Virginia, beginning with 1776 and ending with 1870, occupy 4, 7, 18, and 22 pages each. Pennsylvania has grown from 8 pages to 23; Texas, from 10 to 24; Illinois, from 10 to 25. The New Hampshire constitution of 1776 contains 600 words; those of Missouri and South Dakota at the present time, 26,000 words.

CHAPTER LI.

THE STATE LEGISLATURES.

669. **Names.**—The Legislature is the name generally applied to the lawmaking body of the State, but this is not always the constitutional name. In New Hampshire and Massachusetts, it is called the General Court; in North Dakota, Montana, and Oregon, the Legislative Assembly; in about half of the remaining States, the Legislature; and in the other half, the General Assembly.

670. **Names of the Two Houses.**—In Georgia from 1777 to 1789, in Pennsylvania from 1776 to 1790, and in Vermont from its admission into the Union to 1836, the legislature consisted of a single house. But these are the only exceptions to the prevalence of the bicameral system. In all the States the upper house is called the Senate. In Maryland, Virginia, and West Virginia, the lower house is the House of Delegates; in California, Nevada, New York, and Wisconsin, the Assembly; in New Jersey, the General Assembly; and in all the other States of the Union, the House of Representatives. Previous to 1868 North Carolina called her lower house the House of Commons.

671. **Terms of Senators and Representatives.**—In Massachusetts and Rhode Island, the senatorial term is one year; in New Jersey, three years; in Maine, New Hampshire, Vermont, Connecticut, New York, North Carolina, Georgia, Tennessee, Ohio, Michigan, Nebraska, South Dakota, and Idaho, two years. In the remaining States, it is four years. In Massachusetts, Rhode Island, New York, New Jersey, the representatives hold one year; in Alabama, Louisiana, Mississippi, four years; in the other States two years.

672. **Pay of Senators and Representatives.**—In all cases the pay is the same for members of both houses. Sometimes it is fixed, or at least the maximum, by the constitution, but commonly by law. It is three dollars a day and mileage at ten cents a mile, going and coming, in Vermont and Michigan, and $150 a session and mileage at ten cents a mile, in Maine; from these amounts it ranges to $1,500 a year and mileage at ten cents a mile, in New York.

673. **The Number of Members.**—The number of members varies widely in the different States. It is either fixed by the State constitution, or it results from the application of a rule that the constitution prescribes. The number of senators varies from 17 in Delaware and Nevada to 63 in Minnesota; the number of representatives from 35 in Delaware to about 400 in New Hampshire; under her present constitution, the State of New York has 50 senators and 150 assemblymen.

674. **Apportionment.**—The rule that is followed in the apportionment of members of the houses of the legislature depends on population, but population as limited by town and county lines. In apportioning senators much closer attention is paid to such lines than in apportioning representatives. The widest departure from this rule is in Vermont, where representatives have always been distributed among the towns equally, while senators are assigned to the counties according to their numbers. First constitutions always contain an apportionment of representatives, and often later ones; and all the constitutions, with the exception of Delaware, provide for a periodical redistribution of members. Very definite rules relating to the matter are prescribed, and their application is enjoined upon some constituted State authority.

The common practice is to intrust this duty to the legislature, but in Maryland it is given to the governor, and in Ohio to the governor, auditor, and secretary of state. Most of the States provide for a new distribution following each national census. Oregon, Wisconsin, Michigan, Minnesota, and some other States, which have intercalary State censuses, provide for it once in five years.

675. **Representative Population.**—The representative population differs in different States. In some it is the total population as enumerated; in some, the total excluding aliens; in some, the total excluding Indians not taxed; in some, the total excluding Indians not taxed and aliens; in some, the total excluding aliens incapable of naturalization, as the Chinese in California; and in a few, the voters.

676. **Districting the State.**—Generally some civil division already existing is adopted as a unit, as the county in the Middle and Western States, and both the county and the town in New England. As it is not deemed desirable that the members of the two houses should have just the same constituents, the representative and senatorial districts do not commonly coincide. The factors to be considered in establishing the two districts are, the number of members to be distributed, population, existing civil divisions, and the representation of fractions.

The common rule is to fix in the constitution maximum and minimum numbers for each house, leaving a discretionary power to the legislature within these limits. In such cases the legislature ordinarily first fixes the number of members, then determines the ratio of representation by dividing the population by this number, and finally establishes the districts with reference to the quotient. This is the method employed by Congress in apportioning national Representatives, except that Congress leaves the districting to the State legislatures. A few State constitutions, however, fix ratios of representation, and direct that these ratios shall be applied to the population to ascertain the size of the houses by division.

Most of the constitutions give the State authority charged with the duty of apportionment, power to group counties when necessary; while they also deny or limit power to divide the civil division adopted as the unit. With a view to preventing the aggregation of too much political power at one point, most of the States having large cities limit the number of representatives assigned to them by requiring a larger population than in other parts of the State. Several States assign to each county at least one representative; while New Jersey and South Carolina assign one senator to each county. The representation of fractions is duly provided for; but that subject, which is quite technical, need not be considered here.

677. **Legislative Sessions.**—The constitutions of Massa-

chusetts, Rhode Island, New York, New Jersey, Georgia, and South Carolina provide for annual sessions; the constitution of Alabama for quadrennial sessions; the constitutions of the other States for biennial sessions. In Ohio, however, the custom of the successive General Assemblies long was to hold an adjourned session, but it has now been abandoned. The governors of the States may call special sessions when in their judgment occasion for them arises.

678. Length of Sessions.—Some of the States, as Maine, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Ohio, Wisconsin, and Texas, have left the length of the session wholly to the discretion of their legislatures. In other States the length is limited by the constitution, the limit ranging from 40 to 90 days.

679. Powers of the Separate Houses.—The powers of the separate houses of the State legislatures are practically the same as the powers possessed separately by the houses of Congress.

1. They are the judges of the qualifications, elections, and returns of their own members.

2. They choose their own officers, except that the lieutenant governor in States having such an officer is the constitutional president of the Senate.

3. The House of Representatives has the sole power of impeachment, while the Senate is the trial court. Some States, however, associate members of the judiciary with the Senate in the trial of such cases; for instance, the constitution of New York constitutes the president of the Senate, the senators, or a major part of them, and the judges of the Court of Appeals, or a major part of them, such a court.

680. Legislative Powers.—The powers of legislation that are reserved to the States, or to the people, are far more numerous than those delegated to Congress. Still, the State legislature by no means possesses all these reserved powers. The people prohibit the legislature to exercise powers that they wish to retain in their own hands. There is no express delegation of power. No State constitution

contains such a section as number 8, Article I., of the national Constitution, "Congress shall have power," followed by an enumeration of the principal powers of legislation delegated. Such of the reserved powers as are not denied them, the legislatures may exercise.

681. Legislative Powers Reserved.—The powers denied to the legislature differ in different States. However, all the States that have adopted new constitutions in recent years have shown an increasing jealousy of the legislative branch of the government. Montana provides that the Legislative Assembly shall not pass local or special laws on any of more than thirty enumerated subjects. The constitution of Ohio says: "All laws of a general nature shall have a uniform operation throughout the State." The purpose of such provisions is to prevent the evils growing out of special legislation. On some subjects the legislature is not allowed to act at all.

682. Modes of Legislation.—While provisions relating to modes of legislation are commonly much more minute than those found in the national Constitution, State modes of legislation do not widely differ from those followed in Congress. Some constitutions prescribe that bills on all subjects may originate in either house; others, that bills for raising revenue must originate in the lower house. Some provide that all legislation must be by bill; others are silent on this point. It is common to specify that no bill shall relate to more than one subject, and that this shall be distinctly stated in the enacting clause. Enacting clauses are of different forms. In Ohio it is: "Be it enacted by the General Assembly of the State of Ohio;" in Michigan: "The people of the State of Michigan enact;" in New York: "The people of the State of New York, represented in Senate and Assembly, do enact," etc.

683. Enacting Laws.—The rules regulating the passage of laws are established by the constitution. Sometimes a majority of a quorum suffices to carry a measure, but commonly a majority of all the members elected to each house

is necessary. In two States, Rhode Island and North Carolina, the action of the legislature alone is sufficient for the enactment of laws, as they have never given their governors the veto power. Several other States conferred such power at comparatively a late date in their history: Connecticut, 1818; Maryland and South Carolina, 1867; Tennessee and Virginia, 1870; West Virginia, 1872; Delaware, 1897; Ohio, 1903.

All but two of the States require bills, and a majority of States joint resolutions also, to be sent to the governor for his approval before they become laws. The rules relating to the subject are very minute and cannot be summarized. New York in the years 1777–1821 intrusted the veto to the governor, chancellor, and judges of the supreme court. Illinois, 1818–1848, gave the same power to the governor and supreme judges. In Vermont, previous to 1838, the governor and council could suspend a law until the following session of the legislature. The governors of New York and some other States can approve some portions of bills and veto other portions. The governors of several States are empowered to approve or veto bills within a certain specified time after the legislature that passed them has adjourned, and in such cases rejection of a bill is final.

CHAPTER LII.

THE STATE EXECUTIVES.

684. Vesting the Executive Power.—Most of the States vest the supreme executive power in the governor, but some vest it in the governor, lieutenant governor, and the heads of certain enumerated departments. But this distinction is more in name than in fact, as we shall soon see.

685. Elections, Terms, and Salaries.—The State constitution usually regulates the election and the term of the governor, and often the salary also; but some details are commonly left to the laws. The States present a considerable variety of provisions relating to these subjects. Most of them hold their elections on the day fixed by Congress for the election of national representatives, Tuesday after the first Monday of November. In most States a plurality of the votes cast suffices for an election, but a few require a majority. In the latter case, when the people fail to elect, the legislature chooses one of the candidates voted for. In all the States holding gubernatorial elections in November, the term begins on or near the first Monday of January following.

In Massachusetts and Rhode Island the term is one year; in New Jersey, three years; in Alabama, California, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, North Carolina, Oregon, Pennsylvania, Utah, Virginia, Washington, West Virginia, and Wyoming, four years; in the other States, two years. The gubernatorial salary ranges from $1,500 in Oregon and Vermont to $10,000 in New York, New Jersey, and Pennsylvania.

686. Duties of the Governor.—In general, the governor's duties are inferior to those of the colonial governor,

who was a viceregal officer. First of all, the governor must see that the laws of the State are faithfully executed. He gives the legislature information of the affairs of the State, in a message at the beginning of every session. He may, when the occasion calls for it, convoke the legislature in special session; and in such cases he states in his message his reasons for so doing, and the legislature, as a rule, can at such session legislate only upon the subjects that he thus brings to its attention. He nominates, and by and with the consent of the Senate appoints, all State officers whose appointment is not otherwise provided for. He fills vacancies in offices occurring in the recess of the Senate. Except in those States that have intrusted the power to a board of pardons, he grants reprieves and pardons to convicted offenders, except in cases of impeachment. In all the States but two he has a limited veto on legislation. The governor is commander in chief of the militia of the State, except when it is in the service of the United States. He may call out the militia to execute the State laws, to repel invasion, and to suppress insurrection. As the commander of the militia, he appoints a military staff — adjutant, quartermaster, and commissary generals, and aides-de-camp — and sometimes also the higher militia officers. In some States the governor is clothed with far more power than in others. His powers, however, are by no means so extensive, comparatively, as those of the President in the national government; especially his appointing power is much more limited.

687. **Executive Departments.**—Every State has a Secretary of State, who keeps the State records and has in his keeping the great seal, and a Treasurer, who is custodian of the State funds. Almost always there is an Auditor or Comptroller, whose business it is to examine and audit the public accounts, and draw warrants upon the treasurer. Commonly there is an Attorney-General, who looks after the legal business of the State in the supreme court, and acts as the law adviser of the governor and legislature, and exercises some oversight of the county law officers. Mention

may also be made of the Superintendent of Public Instruction. In different States are found boards, bureaus, or offices pertaining to lands, immigration, labor, agriculture, education, insurance, railroads, statistics, health, mines, charities, and pardons. The principal officers enumerated in this section are generally elected by the people of the State; the minor officers are commonly appointed by the governor by and with the advice and consent of the Senate; a few are in some States elected by the legislature.

688. Governor's Relations to Heads of Departments.—The governor's relations to the heads of State departments are very different from the relations of the President to the members of his cabinet. Rarely has the governor anything to do, more than any other citizen, with their appointment or election. They do not necessarily belong to the same political party, and frequently do not. They are elected by the people, and are not responsible to him. They may make their reports to him, but only as a matter of form. They are his colleagues rather than his subordinates. In no sense do they form a cabinet. As a result, the State administration is much less unified and centralized than the National administration.

In Part I. of this work we examined the councils that advised the colonial governors in the discharge of their executive duties. Some of them were advisory bodies solely, but most of them were also houses of legislation. Several of the old States, and two or three of the new ones, still have similar councils, although the legislative power that they once possessed has been handed over to the State Senates. These councils are merely advisory bodies.

689. The Lieutenant Governor.—Most of the States elect a Lieutenant Governor who is *ex officio* president of the Senate, and succeeds to the office of governor on the occurrence of a vacancy. But Arkansas, Florida, Georgia, Maine, Maryland, New Hampshire, New Jersey, Oregon, Tennessee, Utah, West Virginia, and Wyoming have no officer bearing the title. In these States the Senate elects its own president, and in eight of them this president becomes

governor in case of a vacancy. In Maryland the legislature, if in session, elects a governor in such cases; otherwise the president of the Senate succeeds to the office. In Oregon the secretary of state succeeds, and in Wyoming and Utah also until the vacancy is filled by an election.

CHAPTER LIII.

THE STATE JUDICIARIES.

690. Vesting the Judicial Power.—Every State has a completely developed judicial system. Sometimes the constitution creates all the leading features of the system, sometimes this is partly left to the legislature. The kinds of courts are very similar in the different States, but the names show many variations. The several kinds will be briefly described.

691. The Justice's Court.—The court of the justice of the peace has a limited jurisdiction in both civil and criminal cases. In Ohio no civil case can originate in this court if the sum in controversy exceeds $100. In most of the other States the limit ranges from $100 to $300. The justice administers penalties, as fines and imprisonment for petty offenses, and binds over for trial in the court above, or commits to jail, persons charged with crimes beyond his jurisdiction. The city police magistrate has a criminal jurisdiction similar to that of the justice of the peace. In some States the justice is appointed by the governor, but in most he is elected by the town or township.

692. The County Court.—The county court is sometimes called the Circuit Court, sometimes the Court of Common Pleas, and sometimes by other names. In respect to the amount of business that it does, it is the most prominent court in the system. It has an appellate jurisdiction from the court below, and a wide original jurisdiction both civil and criminal. Some cities have a municipal court of the same grade as the county court, which does for the city what the other does for the county. A few cities have a complete system of courts within themselves. The county

and municipal courts meet, as a rule, four times a year, and so are called Courts of Quarter Sessions in some States.

693. The Probate Court.—The Probate Court also is a county court. Its principal duties relate to the settlement of the estates of deceased persons. It appoints administrators and guardians, and sometimes has a jurisdiction in condemning property for public use. In some States it issues marriage licenses. Some States have no Probate Court so-called, but intrust probate business to some other tribunal.

694. The Superior Court.—The Superior Court is also known by different names. Sometimes it is called the District Court, sometimes the Circuit Court. The district or circuit includes commonly two or more counties. Sometimes this court is composed of the county judges of the counties embraced in the district or circuit, sometimes of special judges. In some States the supreme judges sit in this court, just as the national justices of the Supreme Court sit in the national Circuit Court. The Superior Court has an appellate jurisdiction from the county courts, and an original jurisdiction as well. The original jurisdiction of the Circuit Court of Ohio is the same as the original jurisdiction of the Supreme Court itself. Some States have still another class of courts intermediate between this one and the Supreme Court.

695. The Supreme Court.—As the name imports, the Supreme Court is properly the highest court of the State. It stands to the State system in the same relation that the Supreme Court at Washington stands to the National system. It sits at certain prescribed times at the State capital, and in some States at other places. Its original jurisdiction is very narrow, but its appellate jurisdiction is very wide.

In 13 States the Supreme Court consists of 3 judges, in 1 State of 4, in 12 States of 5, in 5 of 6, in 7 of 7, in 1 of 9. Their salaries range from $2,500 in North Carolina and Nebraska to $10,000 in Pennsylvania ($10,500 for the Chief Justice).

696. Courts of Appeals.—In several other States the Supreme Court in name is not such in fact; there is still a

higher court that has been styled "the supremest court." In New York and some other States this is called the Court of Appeals, and in New Jersey the Court of Errors and Appeals. Louisiana and some other States have a Court of Appeals below the Supreme Court.

697. Appointment of Judges.—At first the judges were appointed by the governor and council in Massachusetts, New York, and Maryland; in the other States, they were elected by the legislatures. Now a great majority of judges are elected by the popular vote. In Connecticut, Rhode Island, Vermont, and Virginia, the judges of the highest court of the State are elected by the legislature; in Maine, New Hampshire, and Massachusetts, they are appointed by the governor and council; in New Jersey, Delaware, Mississippi, and Louisiana, they are appointed by the governor and senate. In the other States of the Union the people elect them.

698. Tenure of Judges.—Early in the history of the republic, the common rule for the tenure of office of judges was during good behavior. Now, the supreme judges of New Hampshire may serve until they are seventy years of age; in Massachusetts and Rhode Island, the term is life or good behavior; in the other States, the terms vary from two years in Vermont to twenty-one years in Pennsylvania.

699. Officers of Courts.—The constable who serves the processes of the justice's court, the sheriff who serves those of the county, district, and circuit courts, and the clerks of the several courts are commonly elected. The law officers of the several counties, variously called State's attorneys, prosecuting attorneys, and county attorneys, are also elected. It is the business of these officers to look after the legal business of the county, and especially to see that violations of the criminal laws are duly punished. They are also the law-advisers of the county authorities.

700. Jurisdiction.—The jurisdiction of the State courts, in both civil and criminal cases, is coextensive with the State constitution and laws. Cases arising in these courts

that involve federal questions may be carried to the national courts, as previously explained; but with this exception, the judiciary of any State is independent, and its determinations are conclusive and final.

701. **Trial by Jury.**—In discussing the national judiciary, some remarks have been made concerning the right of trial by jury, so dearly prized by all English-speaking men. The State constitutions and laws differ more or less in details in relation to this subject; but all of them have preserved the grand features of the jury system first built up in England, and then transplanted to the colonies in the seventeenth century. Restrictions, limitations, and guarantees similar to those found in the national Constitution and Amendments had been incorporated into the State constitutions before the Convention of 1787 sat, and they are found in all of them to-day.

CHAPTER LIV.

SUFFRAGE, ELIGIBILITY TO OFFICE, AND ELECTIONS.

702. How Fixed.—Every State regulates the qualifications of voters and officeholders in its constitution and laws, except that Amendment XV. of the national Constitution provides that, as respects voting, no discrimination shall be made on account of race, color, or previous condition of servitude. Formerly, property qualifications were imposed upon the voter; these have now been swept away, Rhode Island, the last State to take such action, having done so in 1888. Several States, however, require the payment of a poll tax as a condition for voting.

703. Common Rule of Suffrage.—The common rule is what is sometimes called manhood suffrage. That is, the vote is given to every male person twenty-one years of age and upwards, unless he has some prescribed disqualification. These disqualifications are summed up in rules the principal of which are mentioned below.

704. Citizenship.—A majority of the States demand citizenship of the voter. Some States, however, give the suffrage to every male person of foreign birth of the required age who shall have declared his intention to become a citizen a prescribed time before the election at which he offers his vote, the time varying from thirty days to one year.

705. Residence.—Any person must have resided in the State a certain time before he can become a voter. This period varies from three months to two years; the common rule is one year. The various States also require residence in the county or voting precinct, or both, as ninety days in the one and thirty in the other.

706. **Race.**—The word "white" is still found as a qualification for voting in a few constitutions, but it is overridden by Amendment XV. Indians not taxed are commonly excluded; and so are Chinamen, or persons of the Mongolian race, in States on the Pacific slope.

707. **Education.**—Connecticut and some other States make ability to read the State constitution an electoral qualification. The present constitution of Mississippi, adopted in 1890, requires of the elector the ability to read any section of the constitution of the State, or ability to understand the same when read to him, or to give a reasonable interpretation thereof. Several other Southern States require ability to read or write, with exceptions in favor of property owners, or in favor of those who were voters in 1867 and their descendants, or the like.

708. **Registration.**—To prevent fraudulent voting and secure honest elections, a majority of the States require a registration of the voters to be made in the precinct where they reside, sometimes throughout the State and sometimes in towns and cities having more than a prescribed population. New York, for instance, requires personal registration in all towns and cities having a population of 5,000 and upward.

709. **Religion.**—The constitution of Idaho denies the ballot to all bigamists, polygamists, or persons living in patriarchal, plural, or celestial marriage, or who teach, or in any way countenance, such practices. No other constitution now contains anything that can be termed a religious qualification for suffrage; and here it is more formal than practical.

710. **Various Disqualifications.**—Certain classes of persons are disfranchised for mental or moral reasons. Mention may be made of idiots, lunatics, and persons convicted of infamous crimes, unless civil rights have been restored to them; paupers, duelists, and persons bribing or attempting to bribe electors, are also sometimes disfranchised.

711. **Woman's Suffrage.**—The Territories of Wyoming,

Washington, and Utah gave the ballot to women on the same terms as men. Wyoming, on becoming a State, in 1890, inserted this clause in her constitution, being the first State to take such a step: "The rights of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged on account of sex." In 1893 Colorado adopted an amendment to her constitution putting women on the same footing as men in respect to suffrage and holding office. Utah and Idaho have also accorded the ballot to women. Kansas, Minnesota, Montana, New York, South Dakota, Massachusetts, Ohio, Michigan, and some other States allow women to vote for school officers, and some of them on other questions relating to schools. Kansas also allows women to vote in municipal elections. Montana allows women who are taxpayers, of prescribed age and character, to vote equally with men upon all questions submitted to the vote of the taxpayers, as such, of the State, or any political division thereof.

712. **Cumulative Voting.**—The constitution of Illinois gives each district three representatives, and allows each elector to distribute his three votes as he sees fit, giving them all to one candidate, two to one candidate and one to another, or one to each of three candidates. That of Pennsylvania provides that when two judges of the Supreme Court are to be chosen, each elector shall vote for only one candidate; and that when three judges of the Supreme Court, or three county commissioners, or three county auditors are to be elected, each elector shall vote for only two candidates. The object of these methods of voting is to secure the representation of minorities by enabling them to mass their votes on one or more candidates.

713. **Modes of Voting.**—In all the States voting is now done by ballot, or by voting machine. Formerly the *viva voce* method prevailed in many States, the elector declaring his choice to the judges of the election, who recorded it in the poll-book. Kentucky continued to elect State officers in this manner until 1895.

Since about 1880 most of the States, with a view to protect the voter against intimidation or undue influence in casting his ballot, have taken measures to render voting absolutely secret, by adopting

the Australian system, or modifications of that system. Ballot reform has made its impress upon two or more of the constitutions last adopted. Idaho provides: "An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the Legislature to enact such laws as shall carry this section into effect." And Wyoming: "All voters shall be guaranteed absolute privacy in the preparation of their ballots, and the secrecy of their ballot." In West Virginia the voter is "left free to vote by either open, sealed, or secret ballot, as he may elect."

714. **Holding Office.**—The general rule of eligibility to office may be stated thus: Persons entitled to vote may also hold office, provided they are of a certain prescribed age and have lived within the State a certain prescribed time. The Indiana rule is that the governor must be thirty years of age, must have been a citizen of the United States five years, and must have resided in the State for the five years next preceding his election. And this rule may be taken as a fair example. Several States, as Pennsylvania and Kansas, allow women to hold school offices, and four States allow them to hold any office whatever.

Most of the constitutions declare that no religious test shall be required for the enjoyment of any civil or political right, and that no preference shall be given by law to any religious sect. But several constitutions declare persons disqualified for office who deny the existence of the Supreme Being; and Tennessee insists on a belief in a future state of rewards and punishments. Idaho declares persons who are disfranchised as bigamists or polygamists ineligible to office and also disqualified to sit as jurors.

Formerly office-holding was often limited by property qualifications. It was as late as 1892 that Massachusetts struck from her constitution the provision that no person should be eligible to election as governor unless, at the time of his election, he should be seized, in his own right, of a freehold within the Commonwealth of the value of one thousand pounds.

715. **How Parties Originate.**—In all countries where men are free to think, speak, and act on questions of government, there will arise differences of political opinion. Some men will desire to have the government carried on in one

way, some in another way; and they will all wish to see their favorite ideas carried into practical effect. As separate individuals men can exert little influence upon public affairs. Accordingly, those who agree on what they consider leading questions learn to act together. In other words, they form a political party, which may be defined as a body of citizens who agree in what they consider the essentials of political faith organized for political action. Concert and organization are as necessary to efficiency in politics as in other spheres of activity.

716. **Party Committees.**—The force that is always directing and to a great extent executing the work necessary to carry the elections is the great series of party committees. In general, every civil division that elects officers has within it a committee to look after the interests of each of the great political parties. Thus there are township committees, county committees, committees for the congressional districts, and State committees; while at the top of the series is the national committee of each party. All these are made up so as to represent in some proportion the subordinate civil divisions. County committees represent the townships or precincts within the county; committees for congressional districts represent the counties; State committees represent the congressional districts. The national committee is composed of one member from each State and one from each Territory. The work of these party committees includes the holding together of their respective bodies of voters, and the gaining of new adherents. They handle to a great extent the money expended for party ends. Their most conspicuous office is to manage the political conventions within their respective districts.

717. **Political Conventions.**—The chief work of a political convention is to nominate candidates for the offices to be filled within the district to which the convention corresponds. In other words it is to make the party ticket. It also chooses delegates to the convention next higher in rank, and a member or members of the party committee for the next

higher political division. The convention is summoned by the proper committee at such time as to give a suitable interval for party work before the next election. The national conventions are held once in four years to put in nomination candidates for the offices of President and Vice President.

718. **Political Platforms.**—The various conventions commonly adopt resolutions declaring the leading articles of party doctrine as those participating understand them. Such resolutions, when adopted by a State convention, are called a State platform; when adopted by a national convention, a national platform.

719. **Officers and Rules.**—The various political bodies that have been described appoint their own officers, chairman and clerk, or president and secretary. The higher conventions, like legislative bodies, do much of their work by committees. Business is commonly transacted in accordance with the ordinary rules governing public assemblies. Still every convention has a right to enact rules for its own government, and also to enact rules that, until they are repealed, will bind the corresponding central committee and the next ensuing convention.

720. **Representation and Voting.**—A common rule is to assign the members that make up conventions within the State to the townships, counties, etc., according to the number of votes that they cast for the leading candidate on the party ticket at the last preceding general election. With a single exception, a majority suffices for carrying a vote. It is a long-standing rule of the Democratic national conventions to require two-thirds of those voting to nominate candidates for President and Vice President.

721. **The Unit Rule.**—It is not uncommon for the delegates to a convention from the same political division, as the township, county, or State, to vote together, as one man, in making nominations. This is to secure greater weight in deciding the issue. Sometimes a delegation is instructed to vote for a certain candidate, as a presidential candidate. This is known as the unit rule.

722. **Direct Nominations.**—It is obvious that the nomination of candidates by conventions takes away from the mass of voters all freedom in the choice of individual men. This is contrary to the principles of republican government. A governor of one of the States has said on this subject: "The people are as much entitled to their right to choose candidates as to their right to choose their officers at the ensuing election." Nomination by primary elections is the name given to the system that secures this end.

723. **Primary Meetings and Caucuses.**—When the voters of a given party within a township or precinct gather together to choose candidates for the local offices, the assembly is a primary meeting. Such meetings often designate the delegates to the county convention, and so are the starting point in the convention system. This is particularly true in cities where party activities begin in the ward primaries. The name "caucus" is also applied to the primary meeting. However, this name is more properly used to denote the smaller meetings that are called by a more private initiative, for the purpose of agreeing upon schemes to be worked out at the primaries.

724. **Primary Elections.**—It would generally be impracticable to summon a meeting of all the voters of a county for the direct nomination of candidates for the offices. Still mass conventions, which are opposed in character to conventions of delegates, are sometimes called at the discretion of party leaders. It would be highly impracticable to hold a mass convention for a congressional district or a State. However, primary elections for the larger civil divisions, which means the direct choice of party candidates by the voters themselves, may be conducted by summoning primary meetings in the different precincts and taking the result of all the votes cast. The primary election system, it will be seen, is opposed to the nominating convention as made up of delegates. It is sometimes called the "Crawford County Plan," from Crawford County, Pennsylvania, where it is said to have originated.

725. State Legislatures and Party Machinery.—In no other country is such an extensive system of party machinery found as in the United States. It embraces the caucus, primary meeting, and county, district, State, and national conventions. Its operations depend largely upon the series of committees which correspond to the various grades of civil divisions. The whole system has been built up by the purely voluntary activity of the political parties. Notwithstanding the very great part that this machinery plays in determining political events, it lies, to a very great extent, outside the pale of the laws. However, State legislatures have begun to take important action upon the subject of nominating candidates for office. For instance the laws regulating elections define, to a certain extent, how party conventions shall be conducted. There is now a movement in a number of States to establish by law some form of the primary election system. It has not been uncommon to employ this system in certain cities and towns. In the South, where party organization is not so complete as in the Northern States, direct nominations have been the rule to a greater extent than in the North. However, the matter has usually been left to the choice of party leaders, the law merely making certain regulations for all systems. In 1899 Minnesota led the way in making direct nominations mandatory throughout the State, though not for all grades of offices. In 1902 the governors of four States, Mississippi, Maryland, New Jersey, and Virginia, recommended action on the subject to the legislatures. In the first two of these States such laws were passed.

CHAPTER LV.

LOCAL GOVERNMENT.

REFERENCES.

The best historical work on this subject is Howard, *An Introduction to the Local Constitutional History of the United States* (Vol. I., "Development of the Township, Hundred, and Shire"). Johns Hopkins University, *Studies in the Historical and Political Sciences,* edited by H. B. Adams, Vol. I., "Local Institutions" (additional matter relating to the same subject is found in Vols. II., III.; there are also papers on municipal government in Vols. IV., V., VII.); Fiske, *Civil Government in the United States Considered with Reference to its Origins;* Galpin, *Statistical Atlas of the United States, with Maps, the Seventh Census;* Conkling, *City Government in the United States;* Shaw, *Municipal Government in England;* Jenks, *An Outline of English Local Government.*

Attention has been drawn to the fact that the national Constitution and laws form but half of the American Government, and that we must resort to the State constitutions and laws for the other half. But the State governments, properly so-called, by no means exercise all the remaining powers that are necessary to the peace and good order of society. A multitude of legislative and executive acts can be named that the State legislature and executive never touch. Besides, these are the very acts in which the average citizen is most interested. The State constitutions and laws do indeed provide for their performance, but only in an indirect way. These facts bring before us some of the most characteristic political ideas and institutions of the English-speaking race.

These ideas and institutions relate to local government. Their origin in England was dealt with in Chapter II. of this work; also the three types of local government that, in

obedience to English influence and American conditions, sprang up in the United States. We must now return to the subject, for the purpose of describing these types as they exist at the present time.

I. The Town System.

726. Continuity of New England Life.—The political institutions that first rooted in New England, local as well as central, proved to be permanent. The Town system of government has, with time, undergone minor modifications, but it still exists in its principal original features. It is not possible, or even necessary, to follow its history, or fully to describe it, as found in any one State, and much less in all the States; but it is important to state its characteristic features.

727. The New England Town.—The town receives a charter from the State legislature, and is a body politic and corporate. It elects its own officers, and manages its local concerns in its own way. It imposes and collects its own taxes, expends its own money, and lends to the county and State the use of its local machinery for levying and collecting county and State taxes. Every town was once represented in the legislature, but town representation is found now only in New Hampshire and Vermont.

728. Town Meeting.—Once a year, or oftener, the electors of the town meet in town meeting, as their Saxon ancestors met in town-moot. The assembly chooses its own moderator, and any elector can make and discuss motions as well as vote. The business transacted may be thus grouped:

1. The affairs of the town are canvassed; reports are made and accounts presented and discussed.

2. The town taxes are voted, care being taken to designate the objects for which money shall be expended.

3. Town officers are chosen. The annual meeting at which this is done is held in February, March, or April. Town meetings, or elections, for selecting county, State, or national officers are held at such times as the law may fix.

729. **Town Officers.**—The selectmen, three, five, seven, or nine in number, are the general managers of the town business. They issue warrants calling the town meetings; preside at those held for county, State, or national purposes, canvassing the votes and declaring the result; grant licenses, impanel jurors, listen to complaints about public matters, lay out town roads, "speak for the town" in county or State matters, register the voters, and attend to many other things besides. The school committee has general oversight of the town schools. The duties of the other officers are sufficiently indicated by their titles; the clerk, treasurer, assessor of taxes, overseers of the poor, surveyors of highways, fence-viewers, etc.

730. **The County.**—The New England county is also a corporation. It is mainly a judicial, and not a political, division of the State; in Rhode Island there are no county officers but the judicial officers. The three county commissioners, elected by the people, build and manage the county buildings, lay out new highways leading from one town to another, estimate the annual county taxes and apportion them among the several towns and cities, audit the accounts of the treasurer, and perform a variety of other business. Other officers are the clerk of the court, the treasurer, the register of deeds, and the register of probate, who is the clerk of the Probate Court.

II. The County System.

731. **Its Extent.**—The example of Virginia, in which the county system first grew up, and the influence of similar material and social conditions, firmly fixed the county system in all the old South Atlantic States. Moreover, it was an overflow of the population of these States that created the new ones west of the Alleghany Mountains and south of the Ohio River. As these people carried their old ideas and institutions with them, and as they found in the West physical conditions similar to those that they had left behind, it would be strange indeed if the county system had not taken firm

root in the old South Central States. More than this, Southern men from both of the old sections pushed into the Northwest and the farther West, and planted the same system wherever their influence was predominant. Accordingly, it is found to-day, not only in the Southern States west of the Mississippi, but also in California, Oregon, and some other States as well.

732. **The County.**—Where the county system prevails the conditions of the town system are wholly reversed. The county is the political unit, and is clothed with all local political powers. It receives its charter from the legislature, and, as in olden times, is responsible to the State for its quota of the State taxation. "The area of the county," says Professor Galpin, "forbids any general gathering of its inhabitants vested with the legislative and executive functions of the town meeting, as well as any intimate mutual acquaintance between the inhabitants of its different sections. Of necessity, therefore, the administration of all local affairs is intrusted wholly to the county officers, and the political duty and privilege of the citizen begins and ends on election day. The duly authorized officers of the county are thus charged with the care and control of the county property, the levy and collection of State and county taxes, the division of the county into election districts, the laying out and repairing of roads and bridges, the care of the poor, the police of the county, and in general, all county and local affairs." The officers charged with these duties are elected or appointed in different ways and for different times, and are not uniform in number. The common name of the body is County Board or County Court. Other officers are the collector, assessor, superintendent of schools, apportioners of roads, sheriff, etc. There is also a Probate Court as well as the State courts.

733. **The Township.**—The subdivisions of the county are known in different States by different names, viz.: in Alabama, Florida, Colorado, Nebraska, Oregon, and Texas, as precincts; in Arkansas, California, Missouri, Montana,

and the Carolinas, as townships; in Delaware, as hundreds; in Georgia, as militia districts; in Louisiana, where also the counties are called parishes, as wards; in Maryland, as election districts; in Mississippi, as beats; in Tennessee, as civil districts. In most of the county-system States the local subdivisions, by whatever name known, are created by the county authorities. They are but skeletons, and exist only for convenience as districts for holding elections, for fixing the jurisdiction of the justice of the peace, or for determining the militia-company organization. Justices of the peace and constables are found in these districts, but the districts are in no sense political organs.

It is difficult to conceive of modes of local government existing in democratic states more unlike than the town and county systems. In New England the town has a distinct name, of which the citizens are generally proud, and historical associations of which they are still prouder; in the South these feelings and associations all cluster about the county. In Massachusetts we read of the town of Danvers, Quincy, or Dedham; in Virginia of Westmoreland or Rockingham county. In several Southern States the subdivisions are numbered, many or all of them having no names of their own. Mr. Jefferson's admiration of the town system, and his futile attempts to introduce it into Virginia, are well known.[1]

III. The Mixed System.

734. Two Types.—As we saw in Chapter II., two types of the mixed system, which is also called the Compromise system, appeared in Colonial times, the one in New York and the other in Pennsylvania. In both States town or township and county elements are found, but they are combined in different ratios. The New York type, possibly owing to New England influence, is the more democratic, placing greater stress on the township; the Pennsylvania type, possibly owing to Southern influence, is the more centralized, placing greater stress on the county. Their common features, as well as the leading points of difference, will be more carefully stated.

---

[1] See his *Works*, Vol. V., p. 525; Vol. VI., p. 13, Vol. VII., p. 357.

735. **The County.**—In both New York and Pennsylvania, the county is a body politic and corporate. In New York the county administration is in the hands of a board of supervisors, in which the townships are equally represented; in Pennsylvania, it is in the hands of a board of three commissioners, elected by the county at large. The New York supervisor is also a township officer in his township; but the Pennsylvania commissioner has no township powers or duties whatever. The county board in both States lays out county roads and builds county bridges; erects and cares for the county buildings; levies taxes and borrows money for county purposes, subject to law; audits the accounts of county and township officers; passes upon claims against the townships, directing the raising of funds for their payment, as well as township propositions to borrow money, and discharges all duties properly connected with the county administration. All taxes, except such as may be laid by school districts for school purposes and by municipalities, are levied by the county board; State taxes on the warrant of the State authority, county taxes, not exceeding a certain limit, at its own discretion, and township taxes on the certificate of the township authority. The New York board examines and allows claims against the county, and levies taxes for their payment; in Pennsylvania both duties are performed by a board of three special auditors. Other county officers are the clerk, the treasurer, the recorder or register of deeds, and the commissioner or superintendent of schools.

736. **The Township.**—Under the dual system, the township is also a body corporate and politic. In New York it is created by the county board; in Pennsylvania, by the County Court of Quarter Sessions; in New Jersey, by the legislature. It has power to lay out and repair the highways, to estimate the amount of taxes to be raised for schools and other local purposes, which estimates it submits to the county authorities for approval, and, in general, to act upon local matters not delegated to the county. In New York the township meeting passes directly upon certain local

questions; but in Pennsylvania, where the administration is more centralized, these duties devolve upon a local board of supervisors. The township officers are one or more supervisors, a clerk, assessors, constables, justices of the peace, and commissioners of the highways. In New York the poor support is furnished partly by the township and partly by the county; in Pennsylvania it is under the control of a county director. Schools are carried on by the township, but are subject to county supervision. It should be added that the legislatures subject both county and township expenses to strict regulation, to prevent abuse of powers.

737. **Blending of Elements in the West.**—The early movements of population in the United States were westward along parallels of latitude. Emigrants from the three divisions of the old States carried with them their political ideas, habits, and preferences; but the emigration from New England was so blended with that from the South, and particularly with that from the Middle States, that it was never able to establish the town system pure and simple. Only the county system and the mixed system are found west of the Atlantic States.

738. **Pennsylvania Type in the West.**—The governor and judges of the Northwest Territory were authorized by the Ordinance of 1787 to adopt and publish such laws of the original States for said Territory as they deemed fit and necessary. The ordinance also contemplated the creation of counties and towns. This first legislature, like the population, was made up of men from all sections of the country: Governor St. Clair was from Pennsylvania, Judge Symmes from New Jersey, Judge Putnam from Massachusetts, Judge Turner from North Carolina. The result was the establishment of the Pennsylvania system north of the Ohio, with some changes effected by New England influence. This early legislation, strengthened by the influences that produced it, permanently settled the status of Ohio and Indiana, and also exerted a considerable influence upon other Western States.

739. **New York Type in the West.**—The New York type, more or less modified sometimes by other ideas, has been widely adopted throughout the West and Northwest. In some States, even the township meeting for purposes of legislation has been introduced. Michigan is a good example of the strength of this type; the governor and judges of the Northwest Territory set up the Pennsylvania type, but with an increased proportion of immigrants from New York and New England this was rejected and the New York type substituted in its place.

740. **Changes of Type.**—A closer study of the subject than the present one would bring into view many minor facts of much interest. One of these facts would be the influence of the different sections of the country, and the different systems, upon one another. In some States we sometimes find two systems existing side by side. The first constitution of Illinois, framed mainly by Southern men in 1818, established the county system; the constitution of 1848, there having been a large influx of Eastern population in the meantime, authorized a law that left the settlement of the question to the people of the counties; and under the law that the legislature passed in pursuance of this authority, more than two thirds of the counties now have the mixed system. In other States, also, as in Missouri and Nebraska, this system is rapidly encroaching upon the county system, under a similar county option law.

741. **Relative Merits of the Several Systems.**—The merits of the different systems cannot be discussed as an abstract question. Much depends upon natural and social factors. The highly specialized town system was most consonant with New England civilization; the county system was best adapted to the South; and the compromise system, under its two forms, has well met the needs of the West and Northwest. This system is now encroaching upon the county system, and it will not be surprising if in time the county system is largely or wholly supplanted. Combining the stronger features of the two other systems, as the Union combines the stronger features of large and small states, the mixed system has shown singular vitality and power.

Evidently, the supervisor type of the county system is more democratic than the commissioner type, but also more cumbersome. It may fairly be claimed for the board of commissioners, particularly in a county where there would be a large number of supervisors, that it is more effective, and gives less opportunity for log-rolling and pipe-laying. The two forms of the mixed system are sometimes

called the Township-county system and the County-precinct system. The political influence of New York and Pennsylvania upon the West has been far greater than that of any other States.

IV. Municipal Government.

742. Need of Municipal Government.—No one of the three systems of local government just described will answer the purposes of a city, or at least of a large city. Nor can the State govern it to advantage.[1] It needs a government that is centralized and efficient. This demand is met by municipal government, a word that means pertaining to a *municipium*, or a self-governing Italian town in the Roman period.

In 1789 there were but five or six places of over 8,000 population in the United States, and but 3.4 per cent of the total population lived in them. In 1900 there were 545 such places, and 33.1 per cent of the population lived in them. At present, therefore, municipal government takes high rank among the local institutions of the country.

743. City and State.—The government of a city is a reduced copy of the government of the State. It has its own constitution, its own laws, its own legislature, executive, and judiciary, its own treasury, and its own police force. Except that it is subject to the State, it occupies a position not unlike that of the free city of the Middle Ages, or like Hamburg and Bremen in the German Empire to-day.

744. The City Constitution.—The constitution of the city is its charter, which is conferred upon the city by the State legislature. Most frequently, in the case of large cities, the charter is a special act or acts enacted in the usual

[1] Mr. Fiske has shown not only that State legislatures are incompetent to manage the local affairs of cities, but also that they have not the time to do so. "In 1870 the number of acts passed by the New York legislature was 808. Of these 212, or more than one fourth of the whole, related to cities and villages. The 808 acts, when printed, filled about 2,000 octavo pages; and of these 212 acts filled more than 1,800 pages." (p. 128.) And yet these acts dealt only with the general features of the cities and villages. When we add to this mass of laws the far greater volume of city and village legislation, we can form some adequate notion of the relation that local government bears to government as a whole.

manner; but sometimes, and particularly in small cities, it is simply some general provisions of the law or constitution that apply to all cities of a certain size. In either case the legislature establishes the principal features of a city government, and declares its duties and responsibilities.

745. **The City Legislature.**—The city legislature is usually called the city council. Frequently it consists of two chambers, the board of aldermen and the common council; but in many small cities, as well as in New York, Chicago, and San Francisco, it consists of only one chamber. The acts of this legislature are generally known as the city ordinances. The council levies the local taxes and makes the local appropriations, and ordinarily has more or less to do with the executive administration.

746. **The City Executive.**—The chief city executive is the mayor. His relations to the council and to the city are very like the relations of the governor to the legislature and the State. He communicates information relative to city affairs in messages, nominates officers, signs or vetoes ordinances, looks after the due execution of the city laws, and commonly has more or less control of the police. The mayor's powers and duties are far more numerous and important in some cities than in others.

747. **City Departments.**—A large amount of the administrative business is usually transacted through bureaus, executive departments, or boards. Mention may be made of the departments of finance, police, streets, public buildings, water supply, improvements, education, and the infirmary. These departments are sometimes administered by salaried officers, sometimes by committees of the council, while sometimes such officers and council committees act together.

748. **The City Judiciary.**—The most characteristic feature of the city judicial system, as such, is the court having jurisdiction of minor criminal offenses. This is sometimes held by the mayor himself, but more frequently, at least where the mayor has large administrative duties to perform, there is a special judge called the city or police judge. The

ordinary justices' courts may also be mentioned. Occasionally a city has a complete system of courts, lacking only a court of final resort, but as a rule cities have, with the exception of the police court, the same courts as the county in which they are situated.

749. **Municipal Reform.**—The great increase in the number of American cities, and the rapid growth of many of them, have been attended by much inefficiency and corruption in city government. Numerous, but as a rule not very successful, attempts have been made to reform these abuses. Perhaps the best known of these plans is that called the Federal Plan, which was put in operation in Philadelphia in 1887. This plan vests all legislative power in the council, and all executive power in the mayor and the heads of certain departments appointed by the mayor with the consent of the council. The mayor also has the veto power. The great argument urged in behalf of this system is that it centers power and responsibility in a few persons.

750. **France and the United States.**—Attention has often been drawn to the contrast in respect to local government presented by France, on the one hand, and the United States, on the other. France is divided into departments, arrondissements, cantons, and communes, all administrative divisions. The department and the commune are the most important. Each of these has its own council or legislature elected by universal suffrage; but these bodies have few powers, and they are limited, first by the local executives, and secondly by the national administration. The prefects and the mayors are dependent upon the central authority rather than upon the people. The result is that local self-government is unknown. While France is a republic, Mr. Fiske well remarks that, "as contrasted with American methods and institutions, it is difficult to call it anything else than a highly centralized despotism."

751. **Local Government and Centralization.**—These definitions are quoted by Mr. Fiske from Mr. Toulmin Smith:

"Local self-government is that system of government under which the greatest number of minds, knowing the most, and having the fullest opportunities of knowing it, about the special matter in hand, and having the greatest interest in its well-working, have the management of it or control over it."

"Centralization is that system of government under which the smallest number of minds, and those knowing it the least, and having the fewest opportunities of knowing it, about the special matter in hand, and having the smallest interest in its well-working, have the management of it or control over it."

CHAPTER LVI.

STATE EDUCATION.

References.

Bureau of Education, *Contributions to American Educational History,* edited by Herbert B. Adams (a valuable series of monographs devoted to education in the different States); Boone, *Education in the United States;* Hough, *Constitutional Provisions in Regard to Education in the Several States of the American Union* (a bulletin published by the Bureau of Education, 1875); Bureau of Education, *Report of Commissioner for 1868,* I., "Education a National Interest;" Donaldson, *The Public Domain, etc.;* Knight, *History and Management of Land Grants for Education in the Northwest Territory;* Ten Brook, *American State Universities and the University of Michigan.*

752. No National School System.—The provision of education is not included among the powers delegated to the national government. The Constitution does not contain the words education and schools, and hence its adoption left the whole subject where it had already been, in the hands of the States, save as Congress might, from time to time, under the general welfare clause, indirectly render them assistance.

753. The State Systems.—Some of the States already had systems of public schools in 1787, which they have extended and improved. The other States have organized them, and every State in the Union now has a system of schools more or less perfect. These systems are all provided for, or are at least recognized, in the State constitutions, and are fully elaborated in school laws.

I. The School Provision.

754. Common Schools.—The studies prescribed by the

State laws or constitutions are called the legal studies. They differ somewhat in different States, but the so-called common branches of English study are found in all the States. The minimum time that the schools must be in session, which is prescribed by law, ranges from four to seven months in the year. Many of the States have enacted laws making a certain amount of education or school attendance compulsory.

755. **High Schools.**—All the States make provision for the creation and support of high schools, but only Massachusetts makes them compulsory. In that State these schools must be open forty weeks in the year, exclusive of vacations, and be taught for the benefit of all the inhabitants of the town. The high schools, or the best of them, serve the double purpose of fitting for college and giving a preparation for life more extended than that furnished by the common schools.

756. **Normal Schools.**—Massachusetts founded the first State normal school, in 1839. There are in this country now 170 public normal schools, State and local, with 45,000 students, and 9,000 graduates a year. Some of the State schools are managed by the State boards of education, and some by special boards of trustees. The city schools are managed by the local boards of education that create and maintain them. The special object of the State schools is the professional education of teachers for the schools of the State; of the local schools, similar education for local teachers.

Pedagogical professorships exist in some of the State universities, as in those of Michigan, Indiana, Iowa, California, Minnesota and Wisconsin, and in Cornell University.

757. **State Universities.**—Congress has given Ohio three townships of land, Florida and Wisconsin four each, Minnesota three and a half, and the other public-land States two each for the creation and support of universities. The State universities of these States were founded in whole or in part with funds derived from these sources, and they are

to-day largely supported in the same way. Still these institutions, or most of them, receive assistance from the State. Several of them receive, besides appropriations for special objects, the proceeds of special taxes. The University of California receives a tax of one fifth of a mill on each dollar of taxable property in the State, the University of Colorado two fifths of a mill, and the University of Michigan one fourth of a mill.

The Universities of Virginia, North Carolina, South Carolina, Georgia, and West Virginia, all of them State institutions, have received no assistance from the national government.

758. Agricultural and Mechanical Colleges.—Congress passed an act in 1862 granting a quantity of land, or in States where Congress had no lands, land-script, equal to 30,000 acres to each State, for each Senator and Representative in Congress to which it was entitled under the census of 1860, that should, subject to the terms of the act, provide a college for teaching agriculture and the mechanical arts. No part of the proceeds of these lands or of the interest can be applied to the provision of buildings, and not more than ten per cent thereof to the purchase of building sites. All of the States have complied with the terms of the act, or are in course of complying; some by creating new institutions, and some by adding new departments in old ones. In some States the funds thus arising have been largely supplemented from other sources, public or private. Congress also votes them money annually.

II. The School Administration.

759. Employment of the State Machinery.—To a considerable extent, the public schools are administered by officers to whom other branches of the State administration are intrusted. Mention may be made of State auditors (or comptrollers) and treasurers, county auditors and treasurers, and of township clerks and treasurers. But an efficient school system requires a special administrative machinery, both State and local.

760. **State Boards of Education.**—Massachusetts created the first State board of education, in 1837. Many of the other States, but not all of them, have followed this example. The Massachusetts board consists of the governor, the lieutenant governor, and eight other persons appointed by the governor and council for eight years. The Michigan board consists of the State superintendent, and three other members elected by the State at large for six years. The more efficient of these boards have jurisdiction, under the law, of questions that arise in the administration of the schools; the less efficient have few and comparatively unimportant duties. Commonly the board stands in a directory or advisory relation to the educational executive of the State.

761. **State Educational Executive.**—In Massachusetts and Connecticut, the State educational executive is elected, for no fixed period, by the State board, and is styled the Secretary of the Board of Education. In New York he is styled the Commissioner of Education, and is elected by the State Board of Regents; in Rhode Island, Georgia, and Ohio he is styled the Commissioner of Schools, and in most of the remaining States, the Superintendent of Schools or of Public Instruction. He is appointed by the governor in Maine, New Hampshire, New Jersey, Pennsylvania, Maryland, Tennessee, and Minnesota; in most of the other States, with the exceptions named above, he is elected by the people. In most of the States the term of office is two, three, or four years.

In some States, as Pennsylvania, the Superintendent is the real head of the State system of schools, performing numerous and important duties; but in others, as in Ohio and Michigan, he is little more than a clerk charged with the collection and publication of educational statistics.

762. **County Boards.**—Many of the States have constituted county boards of education. Such a board is made up of representatives of the townships or school districts, who are also charged with local duties, as inspectors, directors, etc. This county board stands to the schools of the

county in a relation similar to that of a State board to the schools of the State.

763. **County Supervision.**—In many of the States there is an officer to oversee the schools of a particular district, as the county or some similar territorial division. Commonly he is called a superintendent, but in New York and Michigan, a commissioner. He is sometimes elected by the popular vote, sometimes appointed by the county board. In Virginia, all local superintendents are appointed by the State board and the senate. The county superintendent visits schools, confers with teachers and school officers, sees that the laws are observed, and frequently examines and certificates teachers. Where the county system of government prevails, he has more power than in other States. Vermont is the only New England State that has established county supervision.

764. **Town and District Administration.**—Two principal varieties of local administration are found in the different States.

1. In some States the town or township is constituted a school district. It is divided for school provision and attendance, but not for administration. In Massachusetts, for example, the schools of the town district are controlled by a school committee, under the direction of the town meeting; in Indiana, by the township trustee. This is commonly called the township-unit system.

2. Much more common than the township system is the district system. Here the school districts, into which the township is divided, are bodies politic and corporate, and elect their own boards of school managers, called school committees, directors, or boards.

765. **City Administration.**—Cities, and also towns of considerable size, generally have systems of schools separate and apart from those of the townships and counties in which they lie. These are organized under provisions of the school law expressly relating to such cases, or under special charters granted by the legislature. Such systems are controlled

by a local board, sometimes appointed by the mayor or the courts, but commonly elected by the people. The local superintendent of schools is the executive officer of the board.

766. Certificating Teachers.—Certificates are granted to teachers in quite different ways in different States. State certificates are commonly awarded on examination by some State authority, as a State board of examiners. Local certificates are awarded, also on examination, by the town school committee, by the county superintendent, or by a county board of examiners. Cities having a distinct school organization ordinarily have their own examining boards.

It would be easy to show that the character of school administration has been materially influenced by the character of local government, as the town, county, or mixed system.

III. The School Support.

767. Public-Land Endowments of Common Schools.—The Land Ordinance of 1785, which extended to all lands that had been ceded to the United States and relinquished by the Indian tribes, contained in outline the existing system of public-land surveys and in germ the system of public-land endowments for common schools. It provided for the survey of the lands into townships six miles square, the mile-square sections to be numbered from south to north in ranges, and decreed: "There shall be reserved the lot number 16 of every township for the maintenance of public schools in the said township." The national government never owned the wild lands in the thirteen original States, in new States formed out of them, and in Texas; but in all the public-land States, beginning with Ohio in 1802, section No. 16 in every township, has been dedicated to common schools. Moreover, since 1848 section 36 has also been devoted to the same purpose. The title to these lands has always been vested in the State legislatures in trust for the use named in the dedications, and the proceeds arising from their sale constitute permanent funds, the interest of which is applied to the purpose intended.

A CONGRESSIONAL TOWNSHIP ACCORDING TO THE PRESENT MODE OF NUMBERING SECTIONS.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

768. **The Educational-Grant Lands.**—Previous to June 30, 1883, lands had been granted or reserved by Congress for common schools amounting to 67,893,919 acres; for universities, 1,655,520 acres; for agricultural colleges, 9,600,000; or a total of 78,659,439 acres. Lands and moneys that Congress has given the States without designating any particular object to which they should be devoted, have in many instances been partly or wholly applied to school purposes. Mention may be made of the salt-lands, swamp-lands, and special appropriations of 500,000 acres to each public-land State coming into the Union since 1841, percentages on lands sold within the States, and the United States Deposit Fund of 1836.

769. **Funds Provided by the States.**—Many of the States that did not share in the bounty of Congress, have provided school funds out of their own resources, Connecticut leading the way in 1795. Perhaps the largest source of such funds has been the sale of lands belonging to the States.

770. **School Income.**—The school income is derived from a variety of sources, as follows:

1. The income of permanent funds or endowments.

2. State school taxes. These are levied in various ways. Connecticut levies a tax on the property of the State amounting to $2.25 for every person between the ages of 4 and 16 years. Pennsylvania levies a lump sum of $5,000,000 or more. New Jersey levies a tax of two and three-fourths mills, Ohio and Michigan of one mill, and Nebraska of one and one-half mills, on the dollar upon the tax duplicate of the State. Indiana votes 11 cents and Kentucky 22 cents on every $100 of taxable property in the State. Indiana and a number of other States, most of them in the South, levy poll taxes of small amounts for the same purpose.

3. Local taxes. In most States the great resource for school support is taxes imposed by the local authorities. These local taxes are of several kinds, as county, township, city, and district taxes. There is in some States a growing tendency to depend less than formerly upon local taxes and more upon State taxes.

4. Miscellaneous. There are a variety of other sources of school income. Fines, license moneys, penalties, taxes on banks, etc. are used for school purposes in some States.

771. **Modes of Distributing Funds.**—The modes of distributing school funds cannot be described in small compass, but the following points may be noted:

1. In the first States receiving lands from Congress for common schools, each congressional township has its own special fund arising from its own section; but in the later States, beginning with Michigan, in 1837, there is one consolidated fund from which distribution is made to the counties and townships.

2. The common mode of distributing the State funds, no matter from what source they come, with the above modification, is for the State to distribute to the counties, and the counties to the townships or districts, according to the number of persons between certain specified ages, as 4 and 16, 5 and 18, or 6 and 21.

3. It is not uncommon to pay over funds arising from special sources, as fines and licenses, to the county, township, or city in which they are collected.

772. **Free Schools.**—Formerly even the so-called public schools were supported in part by means of rate bills, or tuition charges, assessed upon those who used the schools. But such fees are now almost wholly, if not wholly, unknown in the United States. Charges are sometimes made for instruction in higher branches in high schools, and in universities, but the State common schools are now practically free. The principle is generally admitted that the property of the State should educate the youth of the State. It has, however, been found necessary in most States to protect the public schools and school funds against sectarian religious zeal. Both these ends the constitution of Ohio secures by this provision: "The General Assembly shall make such provision, by taxation or otherwise, as, with the interest arising from the school trust-fund, will secure a thorough and efficient system of common schools throughout the State, but no religious or other sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of the State."

NOTE.— It is a very common misapprehension that the educational land grant policy of the national government originated in the Ordinance of 1787. That document is wholly silent on the subject of educational lands. The misapprehension has arisen from confounding this ordinance with earlier legislation. The ordinance says in respect to education merely that schools and means of education shall forever be encouraged. Grants for common school purposes are first heard of in the Land Ordinance of 1785, and university grants in the sale to the Ohio Company in 1787. Both of these acts of legislation were of merely local application. But they recognized the principle of educational land grants, and this principle has been progressively applied to every public-land State on or before its admission to the Union. The grants are not traceable to any single act of legislation, but have been made in single acts of specific application.—See *Report of the Commissioner of Education, 1892–93*, Vol. II, pp. 1268-1288, for an historical and statistical view of the subject.

CONCLUSION.

NATURE OF THE AMERICAN GOVERNMENT.

773. **The United States a Federal Republic.**— From the beginning of colonial history, government in the United States has been dual. From the beginning, also, it has been largely republican, and since 1776 wholly so. Accordingly, the United States are a federal state, or, more narrowly, a federal republic. Again, government, both National and State, is constitutional; in no other country is so much stress laid on written constitutions. A prescriptive constitution may be better for England, but nothing short of written constitutions, ordained in the most formal and solemn manner, would satisfy the American people. The central idea of the English constitution — the sovereignty of Parliament — is thoroughly repugnant to them.

774. **Features of Federal States.**— Federal states are of several classes, but the class to which the United States belong presents the following features:

Each member of the union is wholly independent of the other members and of the union in all matters which concern itself only, but is subject to the national government in all matters which concern the members collectively. In its own sphere it is wholly independent and sovereign; in the national sphere, it has no independence or sovereignty whatever. It makes its own constitution and enacts and executes its own laws; but this constitution and these laws must be in conformity with the national constitution and laws.

775. **Origin of Federal States.**— Federal states are almost always formed by integration, rarely by disintegration. They commonly result from uniting states partly or wholly

independent, not from dividing states before consolidated. This is shown by the names applied to them: federation, confederation, and union. Of this process no better example can be given than the origin of the United States as traced in Part I. of this work.

776. **Advantages of Federal States.**—Federal states, when they work successfully, combine in large measure the advantages that are claimed for large and small states respectively. These are strength, permanence, and freedom from internal strife and faction, on the one hand; the adaptation of government to local wants, liberty, and high political intelligence and public spirit, on the other. If it is held that federal states do not combine these excellences in the highest degree, the reply may be made that they do avoid the peculiar dangers of large and small consolidated states, oppression and local strife.

777. **Disadvantages.**— The principal disadvantages of a federal state arise from the complexity of its machinery; to adjust the two jurisdictions, or what Mr. Bryce calls the two loyalties and the two patriotisms, in a manner to avoid friction and to secure harmony and efficiency, is one of the most difficult of political problems. Dr. E. A. Freeman, the distinguished historian of federal government, says: "The federal idea, in its highest and most elaborate development, is the most finished and the most artificial production of political ingenuity. It is hardly possible that federal government can attain its perfect form except in a highly refined age, and among a people whose political education has already stretched over many generations. . . . That ideal is so very refined and artificial that it seems not to have been attained more than four or five times in the history of the world." [1]

778. **The Dual Constitution of the United States.**— Judge Jameson says: "And here I may remark that the Constitution of the United States is a part of the constitu-

[1] *History of Federal Government*, pp. 3, 4.

tion of each State, whether referred to in it or not, and that the consitutions of all the States form a part of the Constitution of the United States. An aggregation of all these constitutional instruments would be precisely the same in principle as a single constitution, which, framed by the people of the Union, should define the powers of the General Government, and then by specific provisions erect the separate governments of the States, with all their existing attributions and limitations of power." [1]

779. **Relations of the Two Systems.**—Neither part of this complicated system is a complete government; neither one can be understood without the other; each one is essential to the other, and to society, and neither one is more essential than the other. The citizen is always subject to two jurisdictions. Were the National jurisdiction destroyed, he would have no protection against foreign powers. Were the State jurisdiction withdrawn, he would be at the mercy of internal faction and anarchy. The Nation might assume the powers of the States, the States might become independent nations; or, as Jameson puts it, the American people might melt down their forty-five constitutions, and cast the material into a new mold, thus constituting a consolidated system like that of France. But were they to do this, they would destroy the characteristic features of their political system, and sacrifice those political functions upon which they have always most prided themselves.

780. **Relative Prominence of the Two Jurisdictions.**—The relative prominence of the States and the Nation has undergone considerable change since 1776. At first the Union was more conspicuous than the States; but when the States reorganized their governments, and especially when Congress fell into contempt at the close of the Revolution, the States quite overshadowed the Union. With the Constitution, the Union assumed a new importance, which slowly increased down to the Civil War; that event gave it a

[1] *The Constitutional Convention*, p. 87.

place which it had never had before, and which it is not likely to lose.[1]

781. Nature of the National Government.—As remarked in various chapters, there has been much disputing whether the national Constitution established a State system or a National system. It is strictly neither a National nor a State system, but a combination of the two. In its foundation the Constitution is partly National and partly State, because ratified by the people, but by the people as constituting thirteen States and not one consolidated nation. In the sources of its powers, it is partly National and partly State, because one branch of the legislature represents the people, and one the States, while the two elements blend in the election of the executive. In the operation of its powers — which was the great defect of the Confederation — it is National and not State, because it acts on the people as individuals and not as States. In the extent of its powers it is partly National and partly State, because the powers granted are limited in number, leaving a great mass of powers to the people and to the States, but unlimited in application. In the mode of amendment it is neither wholly State nor wholly National, because both houses of Congress and the State legislatures are necessary to effect amendments.[2]

782. Complexity of the System.—Perhaps there is no government in the world that is more difficult to explain intelligently, and particularly to foreigners, than the American Government. John Quincy Adams called it a "complicated machine"; "it is an anomaly," said he, "in the history of the world. It is that which distinguishes us from all other nations, ancient and modern." No other government is so

---

[1] In 1795 John Jay resigned the office of Chief Justice to accept the governorship of New York, and in 1800 declined a second appointment, assigning this reason: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording support to the national government; nor acquire the public confidence and respect which as the last resort of the justice of the nation it should possess."—Pellew: *John Jay*, pp. 337, 338.

[2] See *The Federalist*, No. 35.

highly specialized. It combines the complexities of both the dual and the republican systems. But complexity of governmental machinery appears to be essential to liberty. With a brief passage from Mr. Webster touching this point, this work may fitly close.

"Nothing is more deceptive or more dangerous than the pretense of a desire to simplify government. The simplest governments are despotisms; the next simplest, limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority, and give many positive and many qualified rights. . . . Every free government is necessarily complicated, because all such governments establish restraints, as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we will place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and, doubtless, the continuance of regulated liberty depends on the maintaining of these boundaries." [1]

[1] *Works*, Vol. 4, p. 122.

APPENDIX.

DOCUMENTS ILLUSTRATIVE OF THE GROWTH OF THE AMERICAN UNION.

"The most ingenious and the most eloquent of modern historical discourses can, after all, be nothing more than a comment on a text."

—Dr. E. A. Freeman.

I. THE MAYFLOWER COMPACT.—1620.

This compact was signed by the whole body of men, forty-one in number, belonging to the Pilgrim company, on board the Mayflower, December 11, 1620, the day before the landing at Plymouth. Although not strictly germane to the general subject of these documents, it is introduced here as it is so frequently referred to in books on government. See Bancroft, *Hist. U. S.*, Vol. I., p. 205, last edition; Hildreth, *Hist. U. S.*, Vol. I., p. 158; Palfrey, *Hist. New England,* Vol. I., p. 162; Frothingham, *Rise of the Republic,* p. 15; and *The American Government,* Chap. I.

In the name of God, Amen; We, whose names are underwritten, the loyall subjects of our dread soveraigne, King James, by the grace of God, of Great Britaine, France, and Ireland King, defender of the faith, etc., haveing undertaken, for the glorie of God, and advancemente of the Christian faith and honor of our king and countrie, a voyage to plant the first colonie in the Northerne parts of Virginia, doe, by these presents, solemnly and mutually, in the presence of God, and one of another, covenant and combine ourselves together into a civil body politick, for our better ordering and preservation and furtherance of the ends aforesaid; and, by vertue heareof, to enacte, constitute, and frame, such just and equall laws, ordenances, acts, constitutions and offices, from time to time, as shall be thought most meete and convenient for the generall good of the Colonie. Unto which we promise all due submission and obedience. In witnes whereof we have hereunder subscribed our names, at Cap Codd,

the 11th of November, in the year of the raigne of our sovereigne lord, King James, of England, France, and Ireland the eighteenth, and of Scotland the fifty-fourth, Anno Domini, 1620.

II. THE NEW ENGLAND CONFEDERATION.—1643.

The New England Confederation was formed for protection against the Dutch on the Hudson River and the Indians. The original suggestion came from Connecticut in 1637. The commissioners of Massachusetts Bay, Connecticut, and New Haven signed the articles May 19, 1643. Plymouth gave her approval later. Rhode Island was refused admission to the league for religious reasons. The United Colonies of New England were, therefore, four in number; they comprised at the time the confederation was formed thirty-nine towns and 24,000 people. The union of Connecticut and New Haven in 1662 destroyed the balance of power. The last meeting of the commissioners was held at Hartford, September 5, 1684. The English historian Chalmers says this confederation "offers the first example of coalition in colonial story, and showed to party leaders in after times the advantages of concert." See Palfrey, Vol. I., p. 623; Bancroft, Vol. I., p. 289; Hildreth, Vol. I., p. 285; Frothingham, p. 39; *The American Government,* Chap. IV.

Articles of Confederation.

Betweene the plantations vnder the Gouernment of the Massachusetts, the Plantacons vnder the Gouernment of New Plymouth, the Plantacons vnder the Gouernment of Connectacutt, and the Gouernment of New Haven with the Plantacons in combinacon therewith.

Whereas wee all came into these parts of America with one and the same end and ayme, namely, to advaunce the kingdome of our Lord Jesus Christ, and to enjoy the liberties of the Gospell in puritie with peace. And whereas in our settleinge (by a wise Providence of God) we are further dispersed vpon the Sea Coasts and Riuers then was at first intended, so that we cannot according to our desire, with convenience, communicate in one Gouernment and Jurisdiccon. And whereas we live encompassed with people of seuerall Nations and strang languages which heareafter may proue injurious to vs or our posteritie. And forasmuch as the Natives have formerly com-

mitted sondry insolences and outrages vpon seueral Plantacons of the English and have of late combined themselues against vs. And seing by reason of those sad Distraccons in England, which they have heard of, and by which they know we are hindred from that humble way of seekinge advise or reapeing those comfortable fruits of protection which at other tymes we might well expecte. Wee therefore doe conceiue it our bounden Dutye without delay to enter into a present consotiation amongst ourselues for mutual help and strength in all our future concernements: That as in Nation and Religion, so in other Respects we bee and continue one according to the tenor and true meaninge of the ensuing Articles: Wherefore it is fully agreed and concluded by and betweene the parties or Jurisdiccons aboue named, and they joyntly and seuerally doe by these presents agreed and concluded that they all bee, and henceforth bee called by the Name of the United Colonies of New-England.

II. The said United Colonies, for themselues and their posterities, do joyntly and seuerally, hereby enter into a firme and perpetuall league of friendship and amytie, for offence and defence, mutuall advise and succour, vpon all just occations, both for preserueing and propagateing the truth and liberties of the Gospel, and for their owne mutuall safety and wellfare.

III. It is further agreed That the Plantacons which at present are or hereafter shalbe settled within the limmetts of the Massachusetts, shalbe forever vnder the Massachusetts, and shall have peculiar Jurisdiccon among themselues in all cases as an entire Body, and that Plymouth, Connecktacutt, and New Haven shall eich of them haue like peculier Jurisdiccon and Gouernment within their limmetts and in referrence to the Plantacons which already are settled or shall hereafter be erected or shall settle within their limmetts respectiuely; prouided that no other Jurisdiccon shall hereafter be taken in as a distinct head or member of this Confederacon, nor shall any other Plantacon or Jurisdiccon in present being and not already in combynacon or vnder the Jurisdiccon of any of these Confederats be received by any of them, nor shall any two of the Confederats joyne in one Jurisdiccon without consent of the rest, which consent to be interpreted as is expressed in the sixth Article ensuinge.

IV. It is by these Confederats agreed that the charge of all just warrs, whether offensiue or defensiue, upon what part or member of this Confederaccon soever they fall, shall both in men and provisions, and all other Disbursements, be borne by all the parts of this Confederacon, in different proporcons according to their different abilitie, in manner following, namely, that the Commissioners for eich Jurisdiccon from tyme to tyme, as there shalbe occation, bring a true account and number of all the males in every Plantacon, or any

way belonging to, or under their seuerall Jurisdiccons, of what quality or condicion soeuer they bee, from sixteene yeares old to threescore, being Inhabitants there. And That according to the different numbers which from tyme to tyme shalbe found in eich Jurisdiccon, upon a true and just account, the service of men and all charges of the warr be borne by the Poll: Eich Jurisdiccon, or Plantacon, being left to their owne just course and custome of rating themselues and people according to their different estates, with due respects to their qualities and exemptions among themselues, though the Confederacon take no notice of any such priviledg: And that according to their different charge of eich Jurisdiccon and Plantacon, the whole advantage of the warr (if it please God to bless their Endeavors) whether it be in lands, goods or persons, shall be proportionably deuided among the said Confederats.

V. It is further agreed That if any of these Jurisdiccons, or any Plantacons vnder it, or in any combynacon with them be envaded by any enemie whomsoeuer, upon notice and request of any three majestrats of that Jurisdiccon so invaded, the rest of the Confederates without any further meeting or expostulacon, shall forthwith send ayde to the Confederate in danger, but in different proporcons, namely, the Massachusetts an hundred men sufficiently armed and provided for such a service and jorney, and eich of the rest fourty-fiue so armed and provided, or any lesse number, if lesse be required, according to this proporcon. But if such Confederate, in danger may be supplyed by their next Confederate, not exceeding the number hereby agreed, they may craue help there, and seeke no further for the present. The charge to be borne as in this Article is exprest: And, at the returne, to be victualled and supplyed with poder and shott for their journey (if there be neede) by that Jurisdiccon which employed or sent for them: But none of the Jurisdiccons to exceed these numbers till by a meeting of the Commissioners for this Confederacon a greater ayd appeare necessary. And this proporcon to continue, till upon knowledge of greater numbers in eich Jurisdiccon which shalbe brought to the next meeting some other proporcon be ordered. But in any such case of sending men for present ayd whether before or after such order or alteracon, it is agreed that at the meeting of the Commissioners for this Confederacon, the cause of such warr or invasion be duly considered: And if it appeare that the fault lay in the parties so invaded, that then that Jurisdiccon or Plantacon make just Satisfaccon, both to the Invaders whom they have injured, and beare all the charges of the warr themselves without requireing any allowance from the rest of the Confederats towards the same. And further, that if any Jurisdiccon see any danger of any Invasion approaching, and there be tyme for a meeting,

that in such case three majestrats of that Jurisdiccon may summon a meeting at such convenyent place as themselues shall think meete, to consider and provide against the threatned danger, Provided when they are met they may remoue to what place they please, Onely whilst any of these foure Confederats have but three majestrats in their Jurisdiccon, their request or summons from any two of them shalbe accounted of equall force with the three mentoned in both the clauses of this Article, till there be an increase of majestrats there.

VI. It is also agreed that for the mannaging and concluding of all affairs proper and concerneing the whole confederacon two Commissioners shalbe chosen by and out of eich of these foure Jurisdiccons, namely, two for the Mattachusetts, two for Plymouth, two for Connectacutt and two for New Haven; being all in Church fellowship with us, which shall bring full power from their seurall generall Courts respectively to heare, examine, weigh and determine all affairs of our warr or peace, leagues, ayds, charges and numbers of men for warr, divission of spoyles and whatsoever is gotten by conquest, receiueing of more Confederats for plantacons into combinacon with any of the Confederates, and all thinges of like nature which are the proper concomitants or consequence of such a confederacon, for amytie, offence and defence, not intermeddleing with the gouernment of any of the Jurisdiccons which by the third Article is preserued entirely to themselves. But if these eight Commissioners, when they meete, shall not all agree, yet it is concluded that any six of the eight agreeing shall have power to settle and determine the business in question: But if six do not agree, that then such proposicons with their reasons, so farr as they have beene debated, be sent and referred to the foure generall Courts, vizt. the Mattachusetts, Plymouth, Connectacutt, and New Haven: And if at all the said Generall Courts the businesse so referred be concluded, then to bee prosecuted by the Confederates and all their members. It is further agreed that these eight Commissioners shall meete once every yeare, besides extraordinary meetings (according to the fift Article) to consider, treate and conclude of all affaires belonging to this Confederacon, which meeting shall ever be the first Thursday in September. And that the next meeting after the date of these presents, which shalbe accounted the second meeting, shalbe at Bostone in the Massachusetts, the third at Hartford, the fourth at New Haven, the fift at Plymouth, the sixt and seaventh at Bostone. And then Hartford, New Haven and Plymouth, and so in course successiuely, if in the meane tyme some middle place be not found out and agreed on which may be commodious for all the jurdisdiccons.

VII. It is further agreed that at eich meeting of these eight Commissioners, whether ordinary or extraordinary, they, or six of them

agreeing as before, may choose their President out of themselues, whose office and worke shalbe to take care and direct for order and a comely carrying on of all proceedings in the present meeting. But he shalbe invested with no such power or respect as by which he shall hinder the propounding or progresse of any businesse, or any way cast the Scales, otherwise than in the precedent Article is agreed.

VIII. It is also agreed that the Commissioners for this Confederacon hereafter at their meetings, whether ordinary or extraordinary, as they may have commission or opertunitie, do endeavoure to frame and establish agreements and orders in generall cases of a civill nature wherein all the plantacons are interested for preserving peace among themselues, and preventing as much as may bee all occations of warr or difference with others, as about the free and speedy passage of Justice in every Jurisdiccon, to all the Confederats equally as their owne, receiving those that remoue from one plantacon to another without due certefycats; how all the Jurisdiccons may carry it towards the Indians, that they neither grow insolent nor be injured without due satisfaccon, lest warr break in vpon the Confederates through such miscarryage. It is also agreed that if any servant runn away from his master into any other of these confederated Jurisdiccons, That in such Case, vpon the Certyficate of one Majistrate in the Jurisdiccon out of which the said servant fled, or upon other due proofe, the said servant shalbe deliuered either to his Master or any other that pursues and brings such Certificate or proofe. And that vpon the escape of any prisoner whatsoever or fugitiue for any criminal cause, whether breaking prison or getting from the officer or otherwise escaping, upon the certificate of two Majistrats of the Jurisdiccon out of which the escape is made that he was a prisoner or such an offender at the tyme of the escape. The Majestrates or some of them of that Jurisdiccon where for the present the said prisoner or fugitive abideth shall forthwith graunt such a warrant as the case will beare for the apprehending of any such person, and the delivery of him into the hands of the officer or other person that pursues him. And if there be help required for the safe returneing of any such offender, then it shalbe graunted to him that craves the same, he paying the charges thereof.

IX. And for that the justest warrs may be of dangerous consequence, espetially to the smaler plantacons in these vnited Colonies, it is agreed that neither the Massachusetts, Plymouth, Connectacutt nor New-Haven, nor any of the members of any of them shall at any tyme hereafter begin, undertake, or engage themselues or this Confederacon, or any part thereof in any warr whatsoever (sudden exegents with the necessary consequents thereof excepted) which are also to be moderated as much as the case will permit, without the

consent and agreement of the forenamed eight Commissioners, or at least six of them, as in the sixt Article is provided: And that no charge be required of any of the Confederats in case of a defensiue warr till the said Commissioners haue mett and approued the justice of the warr, and have agreed vpon the sum of money to be levyed, which sum is then to be payd by the severall Confederates in proporcon according to the fourth Article.

X. That in extraordinary occations when meetings are summoned by three Majistrats of any Jurisdiccon, or two as in the fift Article, If any of the Commissioners come not, due warneing being given or sent, It is agreed that foure of the Commissioners shall have power to direct a warr which cannot be delayed and to send for due proporcons of men out of eich Jurisdiccon, as well as six might doe if all mett; but not less than six shall determine the justice of the warr or allow the demaunde of bills of charges or cause any levies to be made for the same.

XI. It is further agreed that if any of the Confederates shall hereafter break any of these present Articles, or be any other wayes injurious to any one of thother Jurisdiccons, such breach of Agreement, or injurie, shalbe duly considered and ordered by the Commissioners for thother Jurisdiccons, that both peace and this present Confederacon may be entirely preserued without violation.

XII. Lastly, this perpetuall Confederacon and the seueral Articles and Agreements thereof being read and seriously considered, both by the Generall Court for the Massachusetts, and by the Commissioners for Plymouth, Connectacutt and New-Haven, were fully allowed and confirmed by three of the forenamed Confederates, namely, the Massachusetts, Connectacutt and New-Haven, Onely the Commissioners for Plymouth, having no Commission to conclude, desired respite till they might advise with their Generall Court, wherevpon it was agreed and concluded by the said court of the Massachusetts, and the Commissioners for the other two Confederates, That if Plymouth Consent, then the whole treaty as it stands in these present articles is and shall continue firme and stable without alteracon: But if Plymouth come not in, yet the other three Confederates doe by these presents confirme the whole Confederacon and all the Articles thereof, onely, in September next, when the second meeting of the Commissioners is to be at Bostone, new consideracon may be taken of the sixt Article, which concernes number of Commissioners for meeting and concluding the affaires of this Confederacon to the satisfaccon of the court of the Massachusetts, and the Commissioners for thother two Confederates, but the rest to stand vnquestioned.

In testymony whereof, the Generall Court of the Massachusetts by their Secretary, and for the Commissioners Connectacutt and

New-Haven haue subscribed these presente articles, this sixth of the third month, commonly called May, Anno Domini 1643.

At a Meeting of the Commissioners for the Confederacon, held at Boston, the Seaventh of September. It appeareing that the Generall Court of New Plymouth, and the severall Towneships thereof have read, considered and approoued these articles of Confederacon, as appeareth by Commission from their Generàll Court beareing Date the xxixth of August, 1643, to Mr. Edward Winslowe and Mr. Will Collyer, to ratifye and confirm the same on their behalf, wee therefore, the Commissioners for the Mattachusetts, Conecktacutt and New Haven, doe also for our seuerall Gouernments, subscribe vnto them.

JOHN WINTHROP, Governor of Massachusetts.
THO. DUDLEY. THEOPH. EATON.
GEO. FENWICK. EDWA. HOPKINS.
THOMAS GREGSON.

III. PENN'S PLAN OF UNION.—1697.

Penn's plan was presented to the Board of Trade in 1697, in opposition to the board's plan for consolidating the colonies. It is the first of the native or American plans of union. See Bancroft, Vol. II., p. 74; Hildreth, Vol. II., p. 198; Frothingham, p. 110; and *The American Government*, Chap. IV.

A Briefe and Plaine Scheme how the English Colonies in the North parts of America, viz.: Boston, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, and Carolina may be made more usefule to the Crowne, and one another's peace and safety with an universal concurrence.

1st. That the severall Colonies before mentioned do meet once a year, and oftener if need be during the war, and at least once in two years in times of peace, by their stated and appointed Deputies, to debate and resolve of such measures as are most advisable for their better understanding, and the public tranquility and safety.

2d. That in order to it two persons well qualified for sense, sobriety, and substance be appointed by each Province, as their Representatives or Deputies, which in the whole make the Congress to consist of twenty persons.

3d. That the King's Commissioner for that purpose specially appointed shall have the chaire and preside in the said Congresse.

4th. That they shall meet as near as conveniently may be to the most centrale Colony for use of the Deputies.

5th. Since that may in all probability be New York, both because it is near the Center of the Colonies and for that it is a Frontier and in the King's nomination, the Gov. of that Colony may therefore also be the King's High Commissioner during the session after the manner of Scotland.

6th. That their business shall be to hear and adjust all matters of Complaint or difference between Province and Province. As, 1st, where persons quit their own Province and goe to another, that they may avoid their just debts, tho they be able to pay them; 2nd, where offenders fly Justice, or Justice cannot well be had upon such offenders in the Provinces that entertaine them; 3dly, to prevent or cure injuries in point of Commerce; 4th, to consider of ways and means to support the union and safety of these Provinces against the publick enemies. In which Congresse the Quotas of men and charges will be much easier, and more equally sett, then it is possible for any establishment made here to do; for the Provinces knowing their own

condition and one another's, can debate that matter with more freedome and satisfaction and better adjust and balance their affairs in all respects for their common safety.

7ly. That in times of war the King's High Commissioner shall be Generall or Chief Commander of the severall Quotas upon service against a common enemy as he shall be advised, for the good and benefit of the whole.

IV. FRANKLIN'S PLAN OF UNION.—1754.

PLAN OF UNION OF THE BRITISH AMERICAN COLONIES, ADOPTED BY THE CONVENTION AT ALBANY IN 1754.

As sent to the Board of Trade and to the colonies, and as commonly published, the several articles of this plan are accompanied by certain "reasons and motives," explanatory of their meaning and application, written by Franklin. They occupy much more room than the articles themselves, and are here omitted from considerations of space. They can be found in Preston, *Documents Illustrative of American History,* p. 170; Sparks, *Franklin's Writings,* Vol. IV., p. 200; Bigelow, *Works of Franklin,* Vol. II., p. 355, and in *The Old South Leaflets, No. 9.* See Bancroft, Vol. IV., p. 387; Hildreth, Vol. II., p. 443; Frothingham, p. 136; *The American Government,* Chap. IV.; also *Documents relating to the Colonial History of New York,* Vol. VI., and *Collections of the Massachusetts Historical Society, 1836.*

It is proposed that humble application be made for an act of Parliament of Great Britain, by virtue of which one general government may be formed in America, including all the said Colonies, within and under which government each Colony may retain its present constitution, except in the particulars wherein a change may be directed by the said act, as hereafter follows.

PRESIDENT-GENERAL AND GRAND COUNCIL.

That the said general government be administered by a President-General, to be appointed and supported by the Crown; and a Grand Council, to be chosen by the representatives of the people of the several Colonies met in their respective assemblies.

ELECTION OF MEMBERS.

That within —— months after the passing such act, the House of Representatives that happens to be sitting within that time, or that shall be especially for that purpose convened, may and shall choose

members for the Grand Council, in the following proportion, that is to say:—

Massachusetts Bay	7	New Hampshire	2
Connecticut	5	Rhode Island	2
New York	4	New Jersey	3
Pennsylvania	6	Maryland	4
Virginia	7	North Carolina	4
South Carolina	4		—
	—		15
	33		—
Total			48

PLACE OF FIRST MEETING.

—— who shall meet for the first time at the City of Philadelphia, in Pennsylvania, being called by the President-General as soon as conveniently may be after his appointment.

NEW ELECTION.

That there shall be a new election of the members of the Grand Council every three years; and, on the death or resignation of any member, his place should be supplied by a new choice at the next sitting of the Assembly of the Colony he represented.

PROPORTION OF MEMBERS AFTER THE FIRST THREE YEARS.

That after the first three years, when the proportion of money arising out of each Colony to the general treasury can be known, the number of members to be chosen for each Colony shall from time to time, in all ensuing elections, be regulated by that proportion, yet so as that the number to be chosen by any one Province be not more than seven, nor less than two.

MEETINGS OF THE GRAND COUNCIL AND CALL.

That the Grand Council shall meet once in every year, and oftener, if occasion require, at such time and place as they shall adjourn to at the last preceding meeting, or as they shall be called to meet at by the President-General on any emergency, he having first obtained in writing the consent of seven of the members to such call, and sent due and timely notice to the whole.

CONTINUANCE.

That the Grand Council have power to choose their Speaker; and shall neither be dissolved, prorogued, nor continued sitting longer

than six weeks at one time, without their own consent or the special command of the Crown.

MEMBERS' ALLOWANCE.

That the members of the Grand Council shall be allowed for their service ten shillings sterling per diem, during their session and journey to and from the place of meeting, twenty miles to be reckoned a day's journey.

ASSENT OF PRESIDENT-GENERAL AND HIS DUTY.

That the assent of the President-General be requisite to all acts of the Grand Council, and that it be his office and duty to cause them to be carried into execution.

POWER OF THE PRESIDENT-GENERAL AND GRAND COUNCIL; TREATIES OF PEACE AND WAR.

That the President-General, with the advice of the Grand Council, hold or direct all Indian treaties, in which the general interest of the Colonies may be concerned; and make peace or declare war with Indian nations.

INDIAN TRADE.

That they make such laws as they judge necessary for regulating all Indian trade.

INDIAN PURCHASES.

That they make all purchases from Indians, for the Crown, of lands not now within the bounds of particular Colonies, or that shall not be within their bounds when some of them are reduced to more convenient dimensions.

NEW SETTLEMENTS.

That they make new settlements on such purchases, by granting lands in the King's name, reserving a quit-rent to the Crown for the use of the general treasury.

LAWS TO GOVERN THEM.

That they make laws for regulating and governing such new settle-

ments till the Crown shall think fit to form them into particular governments.

RAISE SOLDIERS AND EQUIP VESSELS, ETC.

That they raise and pay soldiers and build forts for the defense of any of the Colonies, and equip vessels of force to guard the coasts and protect the trade on the ocean, lakes, or great rivers; but they shall not impress men in any Colony without the consent of the legislature.

POWER TO MAKE LAWS, LAY DUTIES, ETC.

That for these purposes they have power to make laws, and lay and levy such general duties, imposts, or taxes, as to them shall appear most equal and just (considering the ability and other circumstances of the inhabitants in the several Colonies), and such as may be collected with the least inconvenience to the people; rather discouraging luxury, than loading industry with unnecessary burdens.

GENERAL TREASURER AND PARTICULAR TREASURER.

That they may appoint a General Treasurer and Particular Treasurer in each government when necessary; and from time to time, may order the sums in the treasuries of each government into the general treasury or draw on them for special payments, as they find most convenient.

MONEY, HOW TO ISSUE.

Yet no money to issue but by joint orders of the President-General and Grand Council, except where sums have been appointed to particular purposes, and the President-General is previously empowered by an act to draw such sums.

ACCOUNTS.

That the general accounts shall be yearly settled and reported to the several Assemblies.

QUORUM.

That a quorum of the Grand Council, empowered to act with the President-General, do consist of twenty-five members; among whom there shall be one or more from a majority of the Colonies.

LAWS TO BE TRANSMITTED.

That the laws made by them for the purposes aforesaid shall not be repugnant, but, as near as may be, agreeable to the laws of England, and shall be transmitted to the King in Council for approbation, as soon as may be after their passing; and if not disapproved within three years after presentation, to remain in force.

DEATH OF THE PRESIDENT-GENERAL.

That, in case of the death of the President-General, the Speaker of the Grand Council for the time being shall succeed, and be vested with the same powers and authorities, to continue till the King's pleasure be known.

OFFICERS, HOW APPOINTED.

That all military commission officers, whether for land or sea service, to act under this general constitution, shall be nominated by the President-General; but the approbation of the Grand Council is to be obtained, before they receive their commissions. And all civil officers are to be nominated by the Grand Council, and to receive the President-General's approbation before they officiate.

VACANCIES, HOW SUPPLIED.

But in case of vacancy by death or removal of any officer, civil or military, under this constitution, the Governor of the Province in which such vacancy happens may appoint, till the pleasure of the President-General and Grand Council can be known.

EACH COLONY MAY DEFEND ITSELF IN EMERGENCY, ETC.

That the particular military as well as civil establishments in each Colony remain in their present state, the general constitution notwithstanding; and that on sudden emergencies any Colony may defend itself, and lay the accounts of expense thence arising before the President-General and General Council, who may allow and order payment of the same, as far as they judge such accounts just and reasonable.

V. DECLARATION OF RIGHTS.—1765.

RESOLVES OF THE CONVENTION OF THE ENGLISH COLONIES AT NEW YORK, OCTOBER 19, 1765.

The Congress of 1765, sometimes called "the Stamp Act Congress," and "the Day Star of the American Union," was composed of 28 delegates, representing 9 colonies, viz.: Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, and South Carolina. After sitting from October 7 to 25, the delegates authorized to do so, representing 6 colonies, signed this Declaration of Rights. See Bancroft, Vol. III., p. 154; Hildreth, Vol. II., p. 530; Frothingham, p. 186; Pitkin, *Hist. U. S.*, Vol. I., p. 178; Story, *Commentaries on the Constitution,* Vol. I., p. 130, and *The American Government,* Chap. IV.

The Congress, upon mature deliberation, agreed to the following declarations of the rights and grievances of the colonists in America:

The members of this congress, sincerely devoted, with the warmest sentiments of affection and duty, to His Majesty's person and government, inviolably attached to the present happy establishment of the Protestant succession, and with minds deeply impressed by a sense of the present and impending misfortunes of the British colonies on this continent; having considered as maturely as time will permit, the circumstances of the said colonies, esteem it our indispensable duty to make the following declarations of our humble opinion respecting the most essential rights and liberties of the colonists and of the grievances under which they labor by reason of the several late acts of Parliament.

1. That His Majesty's subjects in these colonies, owe the same allegiance to the crown of Great Britain, that is owing from his subjects born within the realm; and all due subordination to that august body, the Parliament of Great Britain.

2. That His Majesty's liege subjects, in these colonies, are entitled to all the inherent rights and liberties of his natural born subjects within the kingdom of Great Britain.

3. That it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no taxes be imposed on them but with their own consent, given personally, or by their representatives.

4. That the people of these colonies are not, and from their local

circumstances cannot be, represented in the House of Commons, in Great Britain.

5. That the only representatives of the people of these colonies, are persons chosen therein by themselves; and that no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures.

6. That all supplies to the crown, being the free gifts of the people, it is unreasonable and inconsistent with the principles and spirit of the British constitution, for the people of Great Britain to grant to His Majesty, the property of the colonists.

7. That trial by jury is the inherent and invaluable right of every British subject in these colonies.

8. That the late act of Parliament, entitled "An act for granting and applying certain stamp duties, and other duties in the British colonies and plantations, in America, etc.," by imposing taxes on the inhabitants of these colonies, and the said act, and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.

9. That the duties imposed by several late acts of Parliament, from the peculiar circumstances of these colonies, will be extremely burthensome and grievous, and from the scarcity of specie, the payment of them absolutely impracticable.

10. That as the profits of the trade of these colonies ultimately center in Great Britain, to pay for the manufactures which they are obliged to take from thence, they eventually contribute very largely to all supplies granted there to the crown.

11. That the restrictions imposed by several late acts of Parliament on the trade of these colonies, will render them unable to purchase the manufactures of Great Britain.

12. That the increase, prosperity, and happiness of these colonies depend on the full and free enjoyments of their rights and liberties, and an intercourse with Great Britain, mutually affectionate and advantageous.

13. That it is the right of the British subjects in these colonies to petition the King, or either house of Parliament.

Lastly. That it is the indispensable duty of these colonies, to the best of sovereigns, to the mother country, and to themselves, to endeavour by a loyal and dutiful address to His Majesty, and humble applications to both houses of Parliament, to procure the repeal of the act for granting and applying certain stamp duties, of all clauses of any other acts of Parliament, whereby the jurisdiction of the admiralty is extended, as aforesaid, and of the other late acts for the restriction of American commerce.

VI. DECLARATION OF RIGHTS.—1774.

The Congress of 1774 sat at Philadelphia from September 5 to October 14. It contained representatives from all the colonies but Georgia. See Bancroft, Vol. IV., p. 65; Hildreth, Vol. III., p. 43; Frothingham, p. 371; Pitkin, Vol. I., p. 283; Story, Vol. I., p. 133; Curtis, *History of the Constitution*, Vol. I., p. 22; *The American Government*, Chap. IV.

WHEREAS, since the close of the last war, the British Parliament claiming a power of right, to bind the people of America by statutes in all cases whatsoever, hath, in some acts, expressly imposed taxes on them, and in others, under various pretences, but in fact for the purpose of raising a revenue, hath imposed rates and duties payable in these colonies, established a board of commissioners, with unconstitutional powers, and extended the jurisdiction of courts of admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county.

And whereas, in consequence of other statutes, judges, who before held only estates at will in their offices, have been made dependent on the crown alone for their salaries, and standing armies kept in time of peace: And whereas, it has lately been resolved in parliament, that by force of a statute, made in the thirty-fifth year of the reign of King Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons, and misprisions, or concealments of treasons committed in the colonies, and by a late statute, such trials have been directed in cases therein mentioned.

And whereas, in the last session of parliament, three statutes were made; one, entitled "An act to discontinue, in such manner, and for such time as are therein mentioned, the landing and discharging, lading or shipping of goods, wares and merchandise, at the town, and within the harbour of Boston, in the province of Massachusetts Bay, in North America;" another, entitled "An act for the better regulating the government of the province of Massachusetts Bay in New England;" and another, entitled "An act for the impartial administration of justice, in the cases of persons questioned for any act done by them in the execution of the law, or for the suppression of riots and tumults, in the province of Massachusetts Bay in New England;" and another statute was then made, "for making more effectual provision for the government of the province of Quebec, etc." All which statutes are impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights.

And whereas, assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances, and their dutiful, humble, loyal, and reasonable petitions to the crown for redress, have been repeatedly treated with contempt by His Majesty's ministers of state:

The good people of the several colonies of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, New Castle, Kent and Sussex, on Delaware, Maryland, Virginia, North Carolina, and South Carolina justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted and appointed deputies to meet, and sit in General Congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties, may not be subverted. Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for effecting and vindicating their rights and liberties, DECLARE,

That the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS:

Resolved, N. C. D. 1. That they are entitled to life, liberty, and property, and that they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

Resolved, N. C. D. 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.

Resolved, N. C. D. 3. That by such emigration, they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

Resolved, N. D. C. 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. But, from the

necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external for raising a revenue on the subjects in America, without their consent.

Resolved, N. C. D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

Resolved, 6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

Resolved, N. C. D. 7. That these, his Majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, as secured by their several codes of provincial laws.

Resolved, N. C. D. 8. That they have a right peaceable to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibiting proclamations, and commitments for the same are illegal.

Resolved, N. C. D. 9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

Resolved, N. C. D. 10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a counsel appointed, during pleasure, by the crown, is unconstitutional, dangerous and destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

In the course of our inquiry, we find many infringements and violations of the foregoing rights, which from an ardent desire, that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present, and proceed to state such acts

and measures as have been adopted since the late war, which demonstrate a system formed to enslave America.

Resolved, N. C. D. The following acts of parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great Britain and the American colonists, viz.:

The several acts of 4 Geo. III. ch. 15 and ch. 34.—5 Geo. III. ch. 25.—6 Geo. III. ch. 52.—7 Geo. III. ch. 41, and ch. 46.—8 Geo. III. ch. 22, which imposed duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, authorize the judges' certificate to indemnify the prosecutor from damages, that he might otherwise be liable to, requiring oppressive security from a claimant of ships and goods seized, before he shall be allowed to defend his property, and are subservient of American rights.

Also 12 Geo. III. ch. 24, entitled "An act for the better securing his majesty's dock-yards, magazines, ships, ammunition, and stores," which declares a new offence in America, and deprives the American subject of a constitutional trial by jury of the vicinage, by authorizing the trial of any person, charged with the committing any offence described in the said act, out of the realm, to be indicted and tried for the same in any shire or county within the realm.

Also the three acts passed in the last session of parliament, for stopping the port and blocking the harbour of Boston, for altering the charter and government of Massachusetts Bay, and that which is entitled "An act for the better administration of Justice, etc."

Also the act passed at the same session for establishing the Roman Catholic religion, in the province of Quebec, abolishing the equitable system of English laws, and erecting a tyranny there, to the great danger (from so total a dissimilarity of religion, law and government) of the neighboring British Colonies, by the assistance of whose blood and treasure the said country was conquered from France.

Also, the act passed in the same session, for the better providing suitable quarters for officers and soldiers in his majesty's service, in North America.

Also, that the keeping a standing army in several of these colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

To these grievous acts and measures, Americans cannot submit, but in hopes their fellow-subjects in Great Britain will, on a revision of them, restore us to that state, in which both countries found happiness and prosperity, we have for the present, only resolved to pursue the following peaceable measures: 1. To enter into a non-importation, non-consumption, and non-exportation agreement or associa-

tion. 2. To prepare an address to the people of Great Britain, and a memorial to the inhabitants of British America: and 3. To prepare a loyal address to his Majesty, agreeable to resolutions already entered into.

VII. THE NON-IMPORTATION AGREEMENT.—1774.

The following agreement was signed by 50 delegates to the Congress of 1774, and was subsequently ratified by the colonial legislatures. John Adams called it the "memorable league of the Continent in 1774, which first expressed the sovereign will of a free nation in America," and Hildreth says, "it may be considered the commencement of the American Union." It immediately follows the Declaration of Rights, and the bibliography is the same as for the last section.

We, his Majesty's most loyal subjects, the delegates of the several Colonies of New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, the three lower counties of New Castle, Kent and Sussex, on Delaware, Maryland, Virginia, North Carolina, and South Carolina, deputed to represent them in a Continental Congress, held in the City of Philadelphia, on the fifth day of September, 1774, avowing our allegiance to his Majesty, our affection and regard for our fellow subjects in Great Britain and elsewhere, affected with the deepest anxiety, and most alarming apprehensions at those grievances and distresses, with which his Majesty's American subjects are oppressed, and having taken under our most serious deliberation the state of the whole Continent, find, that the present unhappy situation of our affairs, is occasioned by a ruinous system of Colony Administration adopted by the British Ministry about the year 1763, evidently calculated for enslaving these Colonies, and, with them, the British Empire.

In prosecution of which system, various Acts of Parliament have been passed for raising a revenue in America, for depriving the American subjects, in many instances, of the constitutional trial by jury, exposing their lives to danger, by directing a new and illegal trial beyond the seas, for crimes alleged to have been committed in America: and in prosecution of the same system, several late, cruel, and oppressive acts have been passed respecting the town of Boston and the Massachusetts Bay, and also an act for extending the Province of Quebec, so as to border on the western frontiers of these Colonies, establishing an arbitrary government therein, and discouraging the settlement of British subjects in that wide extended country; thus, by the influence of civil principles and ancient prejudices, to dispose the inhabitants to act with hostility against the free Protes-

tant Colonies, whenever a wicked Ministry shall chuse to direct them.

To obtain redress of these grievances, which threaten destruction to the lives, liberty, and property of his Majesty's subjects in North America, we are of opinion that a Non-Importation, Non-Consumption, and Non-Exportation Agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceable measure; and, therefore, we do, for ourselves, and the inhabitants of the several Colonies, whom we represent, firmly agree and associate, under the sacred ties of virtue, honor and love of our country, as follows:

First. That from and after the first day of December next, we will not import into British America, from Great Britain or Ireland, any Goods, Wares, or Merchandise whatsoever, or from any other place, any such Goods, Wares, or Merchandise, as shall have been exported from Great Britain or Ireland; nor will we, after that day, import any East India tea from any part of the world; nor any Molasses, Syrups, Paneles, Coffee or Pimento, from the British Plantations or from Dominica; nor wines from Madeira, or the Western Islands; nor foreign Indigo.

Second. We will neither import nor purchase any slave imported, after the first day of December next; after which time we will wholly discontinue the Slave Trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it.

Third. As a Non-Consumption Agreement, strictly adhered to, will be an effectual security for the observance of the Non-Importation, we, as above, solemnly agree and associate, that from this day we will not purchase or use any tea imported on account of the East India Company, or any on which a duty hath been or shall be paid; and from and after the first day of March next, we will not purchase or use any East India tea whatever; nor will we, nor shall any person for or under us, purchase or use any of those goods, wares, or merchandises, we have agreed not to import, which we shall know, or have cause to suspect, were imported after the first day of December, except such as come under the rules and regulations of the tenth article hereafter mentioned.

Fourth. The earnest desire we have, not to injure our fellow-subjects in Great Britain, Ireland or the West Indies, induces us to suspend a Non-Exportation, until the tenth day of September, 1775; at which time, if the said acts and parts of acts of the British Parliament hereinafter mentioned, are not repealed, we will not directly or indirectly, export any merchandise or commodity whatsoever to Great Britain, Ireland or the West Indies, except rice to Europe.

Fifth. Such as are merchants and use the British and Irish trade,

will give orders, as soon as possible to their factors, agents and correspondents, in Great Britain and Ireland, not to ship any goods to them, on any pretence whatsoever, as they cannot be received in America; and if any merchant, residing in Great Britain or Ireland, shall directly or indirectly ship any goods, wares, or merchandises, for America, in order to break the said Non-Importation Agreement, or in any manner contravene the same, on such unworthy conduct being well attested, it ought to be made publick; and, on the same being so done, we will not from thenceforth have any commercial connexion with any such merchant.

Sixth. That such as are owners of vessels will give positive orders to their captains, or masters, not to receive on board their vessel any goods prohibited by the said Non-Importation Agreement, on pain of immediate dismission from their service.

Seventh. We will use our utmost endeavors to improve the breed of sheep, and to increase their number to the greatest extent; and to that end, we will kill them as sparingly as may be, especially those of the most profitable kind; nor will we export any to the West Indies or elsewhere; and those of us who are or may become over-stocked with, or can conveniently spare any sheep, will dispose of them to our neighbors, especially to the poorer sort, upon moderate terms.

Eighth. That we will, in our several stations, encourage frugality, economy, and industry; and promote agriculture, arts, and the manufactures of this Country, especially that of wool; and will discountenance and discourage, every species of extravagance and dissipation, especially all horse-racing, and all kinds of gaming, cock-fighting, exhibitions of plays, shews, and other expensive diversions and entertainments; and on the death of any relation or friend, none of us, or any of our families will go into any further mourning dress, than a black crape or ribbon on the arm or hat for gentlemen, and a black ribbon and necklace for ladies, and we will discountenance the giving of gloves and scarfs at funerals.

Ninth. That such as are venders of goods or merchandises, will not take advantage of the scarcity of goods that may be occasioned by this association, but will sell the same at the rates we have been respectively accustomed to do, for twelve months last past. And if any vender of goods or merchandises shall sell any such goods on higher terms, or shall in any manner, or by any device whatsoever violate or depart from this Agreement, no person ought, nor will any of us deal with any such person, or his or her factor or agent, at any time thereafter for any commodity whatever.

Tenth. In case any merchant, trader, or other person, shall import any Goods or Merchandise, after the first day of December, and before the first day of February next, the same ought forthwith, at

the election of the owner, to be either reshipped or delivered up to the Committee of the County or Town wherein they shall be imported, to be stored at the wish of the importer, until the Non-Importation Agreement shall cease, or be sold under the direction of the Committee aforesaid; and in the last mentioned case, the owner or owners of such goods shall be re-imbursed out of the sales the first cost and charges; the profit, if any, to be applied towards relieving and employing such poor inhabitants of the Town of Boston as are immediate sufferers by the Boston Port Bill; and a particular account of all goods so returned, stored, or sold, to be inserted in the publick papers, and if any goods or merchandises shall be imported after the said first day of February, the same ought forthwith to be sent back again, without breaking any of the packages thereof.

Eleventh. That a Committee be chosen in every County, City, and Town, by those who are qualified to vote for Representatives in the Legislature, whose business it shall be attentively to observe the conduct of all persons touching this Association; and when it shall be made to appear to the satisfaction of a majority of any such Committee, that any person within the limits of their appointment has violated this Association, that such a majority do forthwith cause the truth of the case to be published in the *Gazette,* to the end that all such foes to the rights of British America may be publickly known and universally contemned as the enemies of American liberty; and thenceforth we respectively will break off all dealings with him or her.

Twelfth. That the Committee of Correspondence in the respective Colonies, do frequently inspect the entries of their Custom Houses, and inform each other, from time to time, of the true state thereof, and of every other material circumstance that may occur relative to this association.

Thirteenth. That all manufactures of this country be sold at reasonable prices, so that no undue advantage be taken of a future scarcity of goods.

Fourteenth. And we do further agree and resolve that we will have no Trade, Commerce, Dealings, or Intercourse whatsoever with any Colony or Province in North America, which shall not accede to, or which shall hereafter violate this Association, but will hold them as unworthy of the right of freemen, and as inimical to the liberties of this country.

And we do solemnly bind ourselves and our constituents under the ties aforesaid, to adhere to this Association until such parts of the several Acts of Parliament passed since the close of the last war, as impose or continue duties on Tea, Wine, Molasses, Syrups, Paneles, Coffee, Sugar, Pimento, Indigo, Foreign Paper, Glass, and Painters' Colors, imported into America, and extend the powers of

the Admiralty Courts beyond their ancient limits, deprive the American subjects of Trial by Jury, authorize the judge's certificate to indemnify the prosecutor from damages that he might otherwise be liable to from a trial by his peers, require oppressive security from a claimant of ships or goods seized, before he shall be allowed to defend his property, are repealed.—And until that part of the act of the 12th George III., ch. 24, entitled, "An Act for the better securing his majesty's Dock-Yards, Magazines, Ships, Ammunition, and Stores," by which any person charged with committing any of the offences therein described, in America, may be tried in any Shire or County within the realm, is repealed—and until the four Acts passed in the last session of Parliament, viz.: that for stopping the Port and blocking up the Harbor of Boston — that for altering the Charter of government of the Massachusetts Bay—and that which is entitled "An Act for the better Administration of Justice," etc.—and that for extending the limits of Quebec, etc., are repealed. And we recommend it to the Provincial Conventions, and to the Committees in the respective Colonies to establish such farther regulations as they may think proper for carrying into execution this Association.

The foregoing Association being determined upon by the Congress, was ordered to be subscribed by the several members thereof; and thereupon, we have hereunto set our respective names accordingly.

In Congress, Philadelphia, October 20, 1774.

PEYTON RANDOLPH, President.

VIII. THE DECLARATION OF INDEPENDENCE.—1776.

On May 5, 1776, the Continental Congress declared that the exercise of every kind of authority under the crown of England should be totally suppressed. On June 7 Richard Henry Lee, of Virginia, offered and John Adams, of Massachusetts, seconded resolutions declaring that the united colonies were, and of right ought to be, free and independent states; that they were absolved from all allegiance to the British crown, and that all political connection between them and Great Britain was totally dissolved; that it was expedient forthwith to take effectual measures for forming foreign alliances, and that a plan of confederation should be prepared and transmitted to the colonies for their consideration and approbation. These resolutions were discussed June 8 and 10, when the well-known committee of five was appointed to draft a declaration in compliance with the first resolution, and the further discussion of the subject was postponed to July 1. The resolution was adopted July 2, and on the 4th of the same month, the Declaration that the committee had reported was agreed upon. It was not engrossed and signed by the members until August 2, following. See Bancroft, Vol. IV., Chap. 28; Hildreth, Vol. III., p. 127; Frothingham, p. 539; Story, Vol. I., p. 137; *The American Government,* Chap. IV.

THE DECLARATION OF INDEPENDENCE.

IN CONGRESS JULY 4, 1776.

The Unanimous Declaration of the Thirteen United States of America.

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the people to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transcient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise;

the State remaining in the meantime exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners: refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their Acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For Protecting them, by a mock Trial, from Punishment for any murders which they should commit on the inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offenses:

For abolishing the free System of English Laws in a neighboring province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our Seas, ravaged our Coasts, burnt our towns and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun with circumstances of Cruelty, and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free People.

Nor have we been wanting in attention to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

[Signed by John Hancock and fifty-seven others, representing all the States.]

IX. ARTICLES OF CONFEDERATION.—1777.

An outline historical sketch of the Articles of Confederation is given in Chapters V. and VI. of this work. See bibliographies prefixed to those chapters. The articles were agreed upon by Congress November 15, 1777, and were ratified by Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Virginia, and South Carolina, July 9, 1778; by North Carolina, July 21, 1778; by Georgia, July 24, 1778; by New Jersey, November 26, 1778; by Delaware, February 22, 1779; by Maryland, March 1, 1781. The ratifications were given by the delegates of the several States in Congress, under instructions given them by the State legislatures.

To all to whom these presents shall come, we the undersigned Delegates of the States affixed to our names, send greeting.

WHEREAS the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventy-seven, and in the Second Year of the Independence of America agree to certain articles of confederation and perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, in the Words following, viz.:

"*Articles of Confederation and perpetual union between the States of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.*"

Article I.—The style of this Confederacy shall be, "The United States of America."

Article II.—Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Article III.—The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare,

binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on acccount of religion, sovereignty, trade, or any other pretence whatever.

Article IV.—The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

Article V.—For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the Legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the mem-

bers of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

Article VI.—No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conferencce, agreement, alliance or treaty with any king, prince or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the

United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

Article VII.—When land forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII.—All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article IX.—The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the Legislative power of the respective States shall be restrained from imposing such imposts and duties on foreignors, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated —of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which author-

ity shall always be exercised in the manner following: Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection or hope of reward": provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedents to such settlement of juris-

diction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States,—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled; but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller

number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same; nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

Article X.—The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee for the exercise of which by the articles of confederation, the voice of nine States, in the Congress of the United States assembled is requisite.

Article XI.—Canada acceding to this confederation, and joining

in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII.—All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII.—Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

X. CONSTITUTION OF THE UNITED STATES OF AMERICA.

For the history of the framing and ratification of the Constitution, with bibliographies, see Chapters VII.-X. inclusive, of this work. The figures marking the clauses of the several sections are not found in the original.

CONSTITUTION OF THE UNITED STATES.—1787.

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I.

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.

1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

2. No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

3. Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Repre-

sentatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3.

1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

2. Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

3. No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

5. The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

6. The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

7. Judgment in Cases of Impeachment shall not extend further than to removal from Office and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the

Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.

1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

2. The Congress shall assemble at least once in every Year, and such meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5.

1. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

2. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

3. Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

4. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.

1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

2. No Senator or Representative shall, during the Time for which

he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7.

1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8.

1. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

2. To borrow Money on the credit of the United States;

3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

4. To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

5. To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

6. To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

7. To establish Post Offices and post Roads;

8. To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

9. To constitute Tribunals inferior to the supreme Court;

10. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

13. To provide and maintain a navy;

14. To make Rules for the Government and Regulation of the land and naval Forces;

15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

16. To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9.

1. The Migration or Importation of such Persons as any of the

States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

3. No Bill of Attainder or ex post facto Law shall be passed.

4. No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

5. No Tax or Duty shall be laid on Articles exported from any State.

6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

7. No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10.

1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

2. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

3. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a

foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

Section 1.

1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

2. Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a list of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation for each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.][1]

3. The Congress may determine the Time of chusing the Elec-

[1] See Amendment XII.

tors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

4. No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

5. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

6. The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

7. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will, to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2.

1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior

Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to

Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

1. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Section 2.

1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

2. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which

he fled, be delivered up to be removed to the State having jurisdiction of the Crime.

3. No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.

Section 3.

1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven, and of the Independance of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names,

Go: WASHINGTON—
Presidt. and Deputy from Virignia.

The Constitution was also signed by thirty-eight others, belonging to twelve of the States, and casting the votes of eleven States, and was attested by William Jackson, Secretary.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

The history of these articles has been given in Chapters XL. and XLIX., but the days on which they were pro-

posed and declared ratified may be recapitulated. Articles I.-X. inclusive, September 25, 1789, December 15, 1791; Article XI., September 5, 1794, January 8, 1798; Article XII., December 12, 1803, September 25, 1804; Article XIII., February 1, 1865, December 18, 1865; Article XIV., June 16, 1866, July 28, 1868; Article XV., February 27, 1869, March 30, 1870.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II.

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII.

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall

not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and boun-

ties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

INDEX OF SUBJECTS.

(See also Table of Contents, pp. vii, viii.)

BIBLIOGRAPHICAL INDEX.

ADAMS, F. S.—The Swiss Confederation. See Cunningham.

ADAMS, H. B.—Johns Hopkins Studies in Historical and Political Science; Contributions to American Educational History.

AMERICAN COMMONWEALTHS.— Connecticut, New York, Maryland, Virginia.

AMERICAN STATESMEN. — Hamilton, Jefferson, Madison, John Adams, John Marshall, Samuel Adams, Patrick Henry, Gouverneur Morris, Washington, Franklin, and Jay.

ANDREWS, I. W.—New Manual of the Constitution.

ANNALS OF CONGRESS.

ANSON, Sir W. R.—The Law and Custom of the Constitution.

ARISTOTLE.—The Politics.

ATLANTIC MONTHLY, THE, April, 1894.—("The Referendum in Switzerland and America.")

BAGEHOT, WALTER.—The English Constitution.

BANCROFT, GEORGE.—History of the United States; History of the Constitution of the United States.

BENTON, T. H.—Abridgment of the Debates of Congress.

BISHOP, C. F.—History of Elections in the American Colonies.

BOONE, R. H.—Education in the United States.

BORGEAUD, CHARLES.—Adoption and Amendment of Constitutions in Europe and America.

BOURINOT, J. G.—A Manual of the Constitutional History of Canada from the Earliest Period to the year 1888, including the British North American Act.

BROWN, ALEXANDER.—The Genesis of the United States.

BRYCE, RT. HON. JAMES.—The American Commonwealth; The Holy Roman Empire; Teaching Civic Duty. (*The Contemporary Review, July, 1893, p. 14.*)

BUREAU OF EDUCATION.—Report of Commissioner for 1868.

BURGESS, J. W.—Political Science and Constitutional Law.

BURKE, EDMUND.—Speech on Taxation of America; Speech on Conciliation of America.

CALHOUN, J. C.—Works of.

CAMPBELL, DOUGLAS.—The Puritan in Holland, England, and America.

CHALMERS, GEORGE.—Political Annals of America.

COINAGE LAWS OF THE UNITED STATES, 1792-1894.—Fourth edition, prepared under the direction of the Committee on Finance of the Senate.

COMPAYRE, GABRIEL. — Lectures on Practical Pedagogy.

COMPENDIUM OF THE UNITED STATES CENSUS, THE, 1870.

CONGRESSIONAL DEBATES.—Annals of Congress and Congressional Record, inclusive.

CONKLING, A. R.—City Government in the United States.

COOLEY, T. M.—Constitutional Limitations; Principles of Constitutional Law; Comparative Merits of Written and Prescriptive Constitutions.

COXE, BRINTON.—Judicial Power and Unconstitutional Legislation.

CRAIK, HENRY, THE ENGLISH CITIZEN.—A series of Short Books on his Rights and Responsibilities.

CREEHORE, C. F.—The Teaching of Civics in the Schools; the Foundation Principles of Government; Jenkins's Bend: A Primary Study in Government. (*Education, Vol. VII., p. 264, p. 456, p. 547.*)

CUNNINGHAM, C. D.—The Swiss Confederation. See Adams.

CURRIER, C. F. A.—Constitution and Organic Laws of France from 1875 to 1889. Translated with an Historic Introduction. (*Annals of the American Academy of Political and Social Science. Supplement. Vol. III., March, 1893.*)

CURTIS, G. T.—History of the Constitution; Life of Daniel Webster.

DAVIS, J. C. B.—Appendix to the Reports of the Decisions of the Supreme Court of the United States. No. 131.

DAVIS, JEFFERSON.—Rise and Fall of the Confederate Government.

DAWSON, W. H.—Germany and the Germans.

DESTY, T. D.—The Constitution of the United States; Manual of Practice in the Courts of the United States.

DICEY, A. V.—Lectures Introductory to the Study of the Law of the Constitution.

DONALDSON, THOMAS.—The Public Domain.

DOYLE, J. A.—The English Colonies in America. I. Virginia, Maryland, and the Carolinas; II. and III., The Puritan Colonies.

DURAND, JOHN.—Documents on the American Revolution.

DUNBAR, C. F.—Laws of the United States Relating to Currency, Finance, and Banking from 1789-1891.

ELLIOT, JONATHAN.—Debates.

FARRAR, TIMOTHY.—Manual of the Constitution.

FEDERALIST, THE.—(Written by Hamilton, Madison, and Jay.)

FISKE, JOHN.—American Political Ideas; The Beginnings of New England; The Critical Period of American History; Civil Government, with Some Reference to its Origins.

FONBLANQUE, ALBANY DE.—How We are Governed; or, The Crown, The Senate, and The Bench.

FREEMAN, E. A.—History of Federal Government; Growth of the English Constitution; Comparative Polities.

FROTHINGHAM, RICHARD.—The Rise of the Republic.

GALPIN, S. A.—The Minor Political Divisions of the United States. (*Statistical Atlas of the United States with Maps.*)

GARFIELD, J. A.—Works of.

GOODLOE, D. R.—The Birth of the Republic.

GOODNOW, FRANK.—Comparative Administrative Law.

GREENE, G. W.—Historical View of the American Revolution.

GREEN, J. R.—The Making of England; History of the English People.

GUGGENHEIMER, J. C.—The Development of the Executive Departments. (*Essays in the Constitutional Development of the United States, edited by J. F. Jameson.*)

HALFORD, A. J.—Official Congressional Directory.

HALLAM, HENRY.—Constitutional History of England.

HAMILTON, J. C.—Editor of The Federalist.

HARE, J. I. C.—American Constitutional Law.

HARRIS, DR. W. T.—The Correlation of Studies. (*The Report of the Committee of Fifteen.*)

HART, A. B.—Introduction to the Study of Federal Government; Formation of the Union. (*Epochs of American History*); Practical Essays on American Government.

HARVARD HISTORICAL MONOGRAPHS.—No. 1.

HILDRETH, RICHARD.—History of the United States.

HINSDALE, B. A.—The Old Northwest; How to Teach and Study History; General Introduction to State Government Series.

HITCHCOCK, HENRY.—American State Constitutions.

HOUGH, F. B.—Constitutional Provisions in Regard to Education in the Several States of the American Union.

HOWARD, G. E.—Local Constitutional History of the United States.

JAMES, E. J.—The Constitution of Germany. Translated.

JAMESON, J. A.—The Constitutional Convention.

JAMESON, J. F.—The Predecessor of the Supreme Court. (*Essays in the Constitutional Development of the United States, edited by J. F. Jameson.*)

JEFFERSON, THOMAS.—Works of.

JENKS, EDWARD.—An Outline of English Local Government.

JOHNSTON, ALEXANDER.—The United States: History and Constitution; American Political History; The

First Century of the Constitution (*New Princeton Review, September, 1887*); Also numerous articles in Lalor's *Cyclopædia*.

JOHNS HOPKINS UNIVERSITY.—Studies in Historical and Political Science.

JOURNAL OF THE FEDERAL CONVENTION, THE.

JOURNALS OF THE AMERICAN CONGRESS, 1774-1778, THE.

KELTIE, J. SCOTT.—The Statesman's Year Book.

KENT, JAMES.—Commentaries on American Law.

KNIGHT, G. W.—History and Management of Land-Grants for Education in the Northwest Territory.

LALOR, J. J.—Cyclopædia of Political Science, etc.

LANDON, J. S.—Constitutional History and Government of the United States.

LANMAN, CHARLES.—History of Congress, 1789-1793.

LARNED, J. N.—History for Ready Reference, etc.

LEBON, ANDRE.—France As It Is.

LECKY, W. E. H.—History of England in the Eighteenth Century.

LIEBER, DR. FRANCIS.—Civil Liberty and Self Government; Life and Letters of.

LINCOLN, PRESIDENT.—First Message to Congress.

LINDERMAN, H. R.—Money and Legal Tender in the United States.

LODGE, H. C.—A Short History of the English Colonies in America.

LOWELL, J. E.—The Referendum in Switzerland and America. (*The Atlantic Monthly, April, 1894.*)

MACDONALD, J. W.—Teaching Civics. (*The Academy, Vol. V., p. 373.*)

MACMASTER, J. B.—History of the People of the United States.

MADISON, JAMES.—Works of; Debates in the Federal Convention. (See *The Madison Papers*, Elliot's *Debates.*)

MAINE, SIR H. S.—Popular Government.

MANUAL OF THE HOUSE OF REPRESENTATIVES, 1895.

MARSHALL, JOHN.—Writings of.

MAY, SIR T. E.—Parliamentary Practice.

MICHAEL, W. H.—Official Congressional Directory.

MILLER, S. F.—Lectures on the Constitution of the United States.

MORSE, J. T.—John Adams.

MUNRO, J. E. C.—The Constitution of Canada.

NATION, THE.—No. 1351.

PARKMAN, FRANCIS.—Count Frontenac and New France under Louis XIV.

PELET, PAUL.—See Lebon.

PELLEW, GEORGE.—John Jay.

PHISTERER, FREDERICK. — Statistical Record of the Armies of the United States.

PHILLIMORE, SIR ROBERT.—Commentaries Upon International Law.

PITKIN, TIMOTHY.—Political and Civil History of the United States.

POLLOCK, SIR FREDERICK.—Introduction to the History of the Science of Politics.

POMEROY, J. M.—Introduction to the Constitutional Law of the United States.

POORE, BEN PERLEY.—Federal and State Constitutions, Colonial Charters, etc.

PRESIDENTIAL COUNTS, THE.

PRESTON, H. W.—Documents Illustrative of American History.

REPORT OF THE CONFERENCE ON HISTORY, Civil Government, and Political Economy. (*Report of the Committee on Secondary School Studies, etc., p. 162, Commonly Called The Report of the Committee of Ten.*)

REPORTS OF DECISIONS OF THE UNITED STATES SUPREME COURT.

ROUSSEAU, J. J.—The Social Contract.

SCHOULER, JAMES.—History of the United States.

SECRET JOURNALS OF THE AMERICAN CONGRESS, 1774-1778, THE.

SEELEY, J. R.—The Expansion of England.

SHAW, ALBERT.—Municipal Government in England.

SIDGWICK, HENRY.—Elements of Politics.

SMALL, A. W.—Introduction to the Study of Society; Beginnings of American Nationality. (*J. H. U. Studies, Eighth Series.*)

SMITH, E. P.—Movement Towards a Second Constitutional Convention in 1788. (*Essays on the Constitutional History of the United States.*)

SMITH, GOLDWIN.—The United States.

SPENCER, HERBERT.—Education.

STANWOOD, EDWARD.—History of Presidential Elections.

STEPHENS, A. H.—The War Between the States.

STEVENS, E. C.—Sources of the Constitution of the United States.

STORY, JOSEPH.—Commentaries on the Constitution of the United States.

STUBBS, BISHOP W.—The Constitutional History of England.

SUMNER, W. G.—The Financier and the Finances of the Revolution; Alexander Hamilton.

TAYLOR, HANNIS.—Origin and Growth of the English Constitution.

TEN BROOK, ANDREW.—American State Universities and the University of Michigan.

THWAITES, R. G.—The Colonies. (*Epochs of American History.*)

TIEDEMAN, E. G.—The Unwritten Constitution of the United States.

TURNER, SAMUEL E.—A Sketch of the German Empire from Early Times to the Dissolution of the Empire.

UNITED STATES STATUTES AT LARGE.

UNITED STATES CIVIL SERVICE COMMISSION.—Tenth Report of.

UNITED STATES SUPREME COURT REPORTS.

VINCENT, G. E.—See SMALL.

VINCENT, J. H.—State and Federal Government in Switzerland

VON HOLST, DR. H.—Constitutional and Political History of the United States; The Constitution of the U. S.

VOSE, J. E.—Methods of Instruction in Civics. (*Education, Vol. VII., pp. 531 and 617.*)

WEBSTER, DANIEL.—Works of.

WHARTON, DR. FRANCIS.—Digest of the International Law of the United States.

WHEATON, HENRY.—Elements of International Law.

WILSON, WOODROW.—The State. Elements of Historical and Practical Politics. A Sketch of Institutional History and Administration; Congressional Government.

WINSOR, JUSTIN.—Narrative and Critical History of America.

WOOLSEY, T. D.—International Law; Political Science.

WOODBURN, J. A.—Causes of the American Revolution. (*J. H. U. Studies in Historical and Political Science, Fifth Series.*)

QUESTIONS

PREPARED BY THE AUTHOR.

1. What is the office of government? 2. In what facts does the necessity of government originate? 3. What is political science? 4. What are the differences between the state, the nation and the government? 5. Define the three kinds of government recognized by Aristotle. 6. Define, also, mixed government, representative government, the republic, centralized and dual governments, the forms of dual government, federal government, and civil government. 7. What is a constitutional government? 8. What are the respective advantages of written and unwritten constitutions? (INTRODUCTION.)

9. What were the London and Plymouth Companies? 10. Name the colonies planted by companies, by proprietors, and by groups of individuals. 11. What were the rights that the charter of 1606 guaranteed to the colonies? (I.[1])

12. Name the colonies that constituted the several classes at the time of the Revolution. 13. What were their common political features? 14. Describe the town type, the county type, and the mixed type of local government. 15. What were the powers of the central governments of the colonies? 16. What were the civil, the religious, and the political rights of the colonies? (II.)

17. Discriminate between the cause and the occasion of the War of Independence. (III.)

18. What are the two aspects under which the Declaration of Independence must be considered? 19. What was its most prominent result? (IV.)

20. What powers did the Continental Congress exercise? 21. Give the history of the Articles of Confederation. (V.)

22. What is the difference between a confederation and a federal state? 23. What were the powers of the Confederation? 24. What were the defects of the governments of 1775-1789? 25. What was *the* question of 1786? (VI.)

26. State the steps leading up to the Federal Convention of 1787. (VII.)

[1] The Roman numerals refer to chapters.

27. What were the three great questions before the Convention? Which was most fundamental? 28. What were the aims of the National party and the State party respectively? 29. What was the Virginia plan? The Jersey plan? 30. What were the aims of the Large-State party and the Small-State party? (VIII.)

31. What are the three compromises of the Constitution? 32. Was the fundamental question answered in a National or a State way? (IX.)

33. Divide the friends of the Constitution into classes; also its enemies. 34. What was the question about a bill of rights? 35. State the different ways in which the Articles of Confederation and the Constitution were ratified. 36. What was the Massachusetts plan of ratification? Why necessary? (X.)

37. What action did Congress take when the ratifications of nine States had been reported? 38. State the material facts attending the inauguration of the new government. (XI.)

39. What is meant by the priority of the States? 40. By the first and second divisions of powers? 41. Define the different kinds of powers; inherent and delegated, expressed and implied, prohibited, reserved, and concurrent. (XII.)

42. Is the general government a National system or a State system? 43. What are the ends for which the Constitution was ordained as expressed in the preamble? 44. What sovereign power ordains the Constitution? (XIII.)

45. Define the fiat and the organic theories of the Constitution. 46. What are the three departments of the government, and what are their relations? (XIV.)

[At this stage of proceedings it is recommended that the student carefully read the Constitution through, in connection with the present chapter. See the Appendix, X.]

47. What is the bicameral system? 48. What is the true theory of representation? (XVI.)

49. By whom are Representatives elected, and for what time? 50. What are their qualifications? 51. What is the constitutional rule for apportioning representation among the States? 52. What are the officers of the House of Representatives, and how are they chosen? (XVII.)

53. What change was made in the method of apportioning Representatives in 1843? (XVIII.)

54. How is the Senate made up? 55. What are the qualifications of Senators, and for what term are they elected? 56. Why are they divided into three classes? 57. Under what circumstances does the Vice President vote in the Senate? (XIX.)

58. What are the general-ticket plan and the district plan of

electing Representatives? 59. What authority does the districting? What is "gerrymandering"? 60. What are the main points of the law of 1866 relating to electing Senators? (XX.)

61. What are the duties of the House of Representatives and the Senate respectively in an impeachment case? 62. Who may be impeached, and for what offenses? 63. What authority declares the punishment? How far may it go? (XXI.)

64. What is a quorum? 65. What are the different modes of voting in the houses? (XXII.)

66. What are the material facts in regard to paying Senators and Representatives? 67. What is meant by being "privileged" from arrest, and not being "questioned," etc.? (XXIII.)

68. Define the President's relations to law making. (XXIV.)

69. Define direct and indirect taxes; duties, imposts, and excises; internal revenue and income tax. 70. What is the difference between a national bond and a treasury note? 71. What was the legal-tender act of 1862? 72. How does Congress regulate the value of money? 73. What is meant by the ratio of 15.898 to 1 (or popularly 16 to 1)? 74. What are the principal features of the national banking system? 75. What is meant by the regulation of commerce? 76. What are the duties of the Interstate Commerce Commission? 77. What are the rules governing naturalization? 78. What is a bankrupt act? 79. What are the provisions of the Constitution in regard to weights and measures? 80. How is counterfeiting punished under the law? 81. What are the two kinds of post offices? 82. What steps are taken to obtain a copyright? A patent right? 83. What are piracies and felonies on the high seas and offenses against the laws of nations? 84. What is the difference between the regular army and the militia? 85. How is the District of Columbia governed? 86. What is the doctrine of implied powers? 87. What are the principles of the two schools of constitutional construction? (XXV.)

88. What is the purpose and operation of the writ of *habeas corpus*? 89. What are bills of attainder and *ex-post facto* laws? 90. What are entering and clearing? 91. What are the rules relating to titles of nobility and presents to persons holding office? (XXVI.)

92. What are the reasons for the prohibitions obtained in Clause 1, Section 10? 93. How do these prohibitions affect the question of State sovereignty? (XXVII.)

94. What are the arguments for and against a single executive? (XXVIII.)

95. What causes led to Amendment XII. of the Constitution? (XXIX.)

96. What was the design of the electoral plan for electing President and Vice President? 97. State the five steps in the election of President and Vice President. 98. Under what circumstances does the House of Representatives elect the President and the Senate the Vice President? 99. What are the rules under which the houses act in such cases? (XXX.)

100. Give the order of the succession in case of the death, etc., of the President. 101. Why should the President's salary not be increased during his term? (XXXI.)

102. What are the steps in making a treaty? 103. Why should the President be commander in chief of the army and navy? 104. What are the three classes of officers with respect to the mode of their appointment? 105. What is the part of the President and Senate in making appointments? 106. How are removals made when the Senate is in session? When it is not in session? 107. What are the duties of public ministers and consuls? (XXXII.)

108. The functions of the executive departments? 109. What is the Cabinet? and what are its relations to the President. (XXXIII.)

110. What are the several grades of United States courts called? 111. What are the rules relating to the judges' tenure of office and salary? (XXXIV.)

112. How far does the judicial power extend? 113. What are the several kinds of jurisdiction? 114. What is the jurisdiction of the several classes of courts? (XXXV.)

115. What are the functions of the grand and petit juries? 116. What is it to give an enemy aid and comfort? 117. What is now the punishment of treason? 118. What is the limitation in respect to attainder of treason and corruption of blood? (XXXVI.)

119. What is a constitutional decision? 120. What is an unconstitutional law? (XXXVIII.)

121. What is the rule in regard to fugitives from justice? (XXXIX.)

122. What are the differences between a State and a Territory? 123. How is a new State admitted to the Union? (XL.)

124. How is domestic violence suppressed in ordinary cases? In extraordinary cases? (XLI.)

125. What are the two steps to be taken in making an amendment to the Constitution? (XLII.)

126. How does the Constitution of the United States guard the weak point in a federal system? (XLIII.)

127. What are the State-sovereignty and National theories of our Constitution? (XLIV.)

128. What is Article VII. of the Constitution? (XLV.)

129. Why are the first ten amendments to the Constitution called

a bill of rights? 130. What did Amendment XIII. accomplish? XIV? XV? (XLVI.)

131. What is the National sphere of the American Government? The State sphere? (XLVIII.)

132. In what points do the later State constitutions differ from the earlier ones? 133. How are limitations imposed on the State governments? (L.)

134. Of what houses are the State legislatures composed? 135. What are the powers of the houses separately? (LI.)

136. What are the duties of a governor? 137. Name the State executive departments. (LII.)

138. What are the various classes of State courts? (LIII.)

139. What are the ordinary qualifications for exercising the right of suffrage? 140. In what States have women this right? (LIV.)

141. In what parts of the country are the three systems of local government found? 142. What is a New England town meeting? 143. What are the two types of the mixed system? 144. What are the principal features of a municipal government? (LV.)

145. What is the range of education provided by the States? 146. What are the leading features of State school administration? 147. What is the difference between the town and district systems? 148. From what sources do the school funds come? 149. What has Congress done for education in the United States? (LVI.)

150. What are the features of the class of federal states to which the United States belong? 151. What do we mean by the dual Constitution of the United States? 152. What are the relations of the State side and the National side of the American Government? (CONCLUSION.)

Milne's Geometry

By WILLIAM J. MILNE, Ph.D., LL.D.,
President New York State Normal College.

MILNE'S PLANE AND SOLID GEOMETRY $1.25

This new text-book in Geometry embodies many original methods of treatment, which while novel are based on sound mathematical and pedagogical principles. The author's aim throughout has been to combine the valuable features of inventional and concrete Geometry with the forms of rigid deductive reasoning, which is one of the chief objects sought in the study.

In this book the student is introduced to Geometry through the employment of inventional steps, supplemented by demonstrations of the fundamental propositions of the science. He is trained to draw proper inferences from the study of accurately drawn figures and by logical deductive reasoning to arrive at the right conclusion. Every theorem is preceded by questions designed to lead the student to discover the geometrical concept clearly and fully before a demonstration is attempted.

The author has endeavored to make the book distinctly practical, and with this in mind has introduced the laboratory method at the beginning and continued it to the end. There has also been supplied a great abundance of undemonstrated theorems and of unsolved problems which are so necessary to the development of the student's faculties in deductive reasoning.

The work is the result of many years' special preparation, and it is confidently believed that it will meet the wants of teachers and schools for a satisfactory text-book in this branch of mathematical science.

MILNE'S PLANE GEOMETRY—Separate . . . 75 cents
MILNE'S SOLID GEOMETRY—Separate . . . 75 cents
MILNE'S KEY TO PLANE AND SOLID GEOMETRY . $1.25

Copies of Milne's Geometry will be sent, prepaid, to any address on receipt of the price by the Publishers:

American Book Company

New York • Cincinnati • Chicago

Carpenter's Geographical Readers

By FRANK G. CARPENTER

North America	60 cents
South America	60 cents
Asia	60 cents
Europe	70 cents
Australia, Our Colonies, and Other Islands of the Sea	60 cents
Africa	60 cents

These new Geographical Readers are by far the most attractive and instructive books of their kind ever published. They are not mere compilations of other books or stories of imaginary travels, but they are the results of the author's actual journeys through the different countries, with personal observations of their native peoples, just as they are found to-day in their homes and at their work. These journeys and visits are described in such simple and engaging manner as to make the books as entertaining as stories, while conveying in this attractive way, useful knowledge and information. While they are written in easy familiar style, and in language not above the comprehension of children, they are strictly accurate in every detail and statement.

The books are well supplied with colored maps and illustrations, the latter mostly reproductions from original photographs taken by the author on the ground. They combine studies in geography with stories of travel and observation in a manner at once attractive and instructive. Their use in connection with the regular text-books on geography and history will impart a fresh and living interest to their lessons.

American Book Company

New York • Cincinnati • Chicago

Guerber's Historical Readers

FOR SUPPLEMENTARY READING

GUERBER'S STORY OF THE THIRTEEN COLONIES

By H. A. GUERBER, Author of "Myths of Greece and Rome," "Myths of Northern Lands," "Legends of the Middle Ages," etc.

Cloth, 12mo, 242 pages. With maps and illustrations . 65 cents

This volume contains a narrative of the early history of this country down to the close of the Revolution, written in a style easily comprehensible by children. It is intended to serve as an historical reader, or as an introduction or supplement to any text-book on American History which may be in use.

GUERBER'S STORY OF THE GREAT REPUBLIC

Cloth, 12mo, 249 pages. With maps and illustrations . 65 cents

In this book the history of our country from The Beginning of the United States as a Nation down to the present time is told in such a way that it cannot fail to interest and impress young readers. Like the "Story of the Thirteen Colonies," it may be used as a supplementary reader or as an elementary text-book on this period of American history.

GUERBER'S STORY OF THE ENGLISH

Cloth, 12mo, 256 pages. With maps and illustrations . 65 cents

This book is designed to serve the double purpose of a Supplementary Reader for Grammar grades and of an elementary text-book in English History. In simple language the author describes in the form of attractive stories and anecdotes, the leading events, characters, and places in English History. The dress and artistic features of the book are in keeping with its contents. The large colored maps of Great Britain and Ireland, of France, and of India will be found convenient for tracing the course of English History and the vast extent of the British colonies and possessions in the world.

Copies of any of the above books will be sent, prepaid, to any address on receipt of the price.

American Book Company

New York • Cincinnati • Chicago

HIGHER MATHEMATICS

Church's Elements of Descriptive Geometry (2 vols.) . **$2.50**
By ALBERT E. CHURCH, LL.D., Professor of Mathematics, United States Military Academy. Two volumes—Text: Cloth, 8vo, 214 pp. Plates: 4to, 28 plates.

McMahon and Snyder's Differential Calculus . . . **$2.00**
By JAMES MCMAHON, A.M., Assistant Professor of Mathematics, Cornell University, and VIRGIL SNYDER, Ph.D., Instructor in Mathematics, Cornell University. Cloth, 8vo, 351 pp.

Murray's Integral Calculus **$2.00**
By DANIEL ALEXANDER MURRAY, Ph.D., Instructor in Mathematics, Cornell University; formerly Scholar and Fellow of Johns Hopkins University. Cloth, 8vo, 302 pp.

Snyder and Hutchinson's Differential and Integral Calculus $2.00
By VIRGIL SNYDER, Ph.D., and JOHN IRWIN HUTCHINSON, Ph.D., of Cornell University. Cloth, 8vo, 320 pp.

Tanner and Allen's Analytic Geometry **$2.00**
By J. H. TANNER, Ph.D., Assistant Professor of Mathematics, Cornell University, and JOSEPH ALLEN, A.M., formerly Instructor in Mathematics, Cornell University; Instructor in the College of the City of New York. Cloth, 8vo, 410 pp.

Raymond's Plane Surveying **$3.00**
With tables. By WILLIAM G. RAYMOND, C.E., Professor of Geodesy, Road Engineering and Topographical Drawing, Rensselaer Polytechnic Institute. Cloth, 8vo, 486 pp., with plates.

Richards's Elementary Navigation and Nautical Astronomy **$0.75**
By EUGENE L. RICHARDS, M.A., Professor of Mathematics, Yale University. Cloth, 12mo, 173 pp., with illustrations and diagrams.

Smith's Elementary Calculus **$1.25**
By PERCEY F. SMITH, Ph.D., Professor of Mathematics, Sheffield Scientific School of Yale University. Cloth, 12mo, 89 pp.

For complete illustrated descriptive catalogue of Mathematical Publications, write to the publishers

AMERICAN BOOK COMPANY
NEW YORK CINCINNATI CHICAGO
BOSTON ATLANTA DALLAS SAN FRANCISCO

Text-Books on Physical Geography

Dryer's Lessons in Physical Geography $1.20

THIS text-book is simpler than any other complete and accurate treatise on this subject now before the public. The physical features of the earth are grouped according to their casual relations and the functions which they perform in the world economy. The characteristics of each group are presented by means of a typical example. Many realistic exercises are introduced to direct the student how to study the thing itself, or some experimental representation of it. These exercises include both field and laboratory work. The book is eminently readable and profusely illustrated.

Hinman's Eclectic Physical Geography $1.00

THIS treatise differs greatly in many particulars from those in common use. The order of treatment pursued is based on the relations of the different divisions of the earth studied; thus, the atmosphere is treated before the sea, because the latter is chiefly affected by the former. Then follows the land, and finally the climate. The numerous charts and diagrams, as well as the illustrations, are accurate, and always helpful for the understanding of the subject to which they pertain. The book has received general commendation throughout the scientific world, and is widely used in the best schools in the United States.

Chamberlain's Field and Laboratory Exercises in Physical Geography $0.50

THIS series of sixty-nine laboratory and field exercises is designed to lead the pupil to interpret the geographical forms and processes about him, and to give him a practical knowledge of the principles of geography as they are illustrated in his neighborhood. The manual is adapted for use with any text-book on Physical Geography. Each exercise begins with a list of the material needed. Directions for the work follow. Then, after the pupil has mastered the principles illustrated by the exercise and has applied them to his immediate neighborhood, he is referred to the leading text-books for a more general application. After each exercise there is ample space for the pupil to make a complete record of the work done.

AMERICAN BOOK COMPANY

NEW YORK CINCINNATI CHICAGO

MYTHOLOGY

GUERBER'S MYTHS OF GREECE AND ROME. Illustrated . $1.50
The same. Without illustrations 1.00

GUERBER'S MYTHS OF NORTHERN LANDS. Illustrated . 1.50

GUEBER'S LEGENDS OF THE MIDDLE AGES. Illustrated . 1.50

By H. A. GUERBER, Lecturer on Mythology.

These companion volumes present a complete outline of Ancient and Mediaeval Mythology, narrated with special reference to Literature and Art. They are uniformly bound in cloth, and are richly illustrated with beautiful reproductions of masterpieces of ancient and modern painting and sculpture.

While primarily designed as manuals for the use of classes in schools where Mythology is made a regular subject of study and for collateral and supplementary reading in classes studying literature or criticism, they are equally well suited for private students and for home reading. For this purpose the myths are told in a clear and charming style and in a connected narrative without unnecessary digressions. To show the wonderful influence of these ancient myths in literature, numerous and appropriate quotations from the poetical writings of all ages, from Hesiod's "Works and Days" to Tennyson's "Oenone," have been included in the text in connection with the description of the different myths and legends.

Maps, complete glossaries, and indexes adapt the manuals for convenient use in schools, libraries, or art galleries.

Copies of the above books will be sent, prepaid, to any address on receipt of the price by the Publishers:

American Book Company

New York • Cincinnati • Chicago

GENERAL HISTORY

Colby's Outlines of General History $1.50

By Frank Moore Colby, M.A.

This General History possesses certain features and advantages which distinguish it from all other text-books of its class. It gives in brief compass a comprehensive outline of the history of the whole world, but a larger proportional space is given to mediaeval and modern history than in most other text-books, in recognition of the relation of these later periods to the present status of the world's history. Written in a fascinating style, it is not a mere collection of dates and names, but a vivid picture of the progress of civilization.

Fisher's Brief History of the Nations $1.50

By George Park Fisher, LL.D.

This is an entirely new work, especially prepared to meet the needs of high school students and general readers. It presents in compact form a graphic and impressive delineation of the world's progress in civilization from the earliest historical period down to the present time. It is by far the most attractive, impartial, and trustworthy text-book on the subject ever written.

Fisher's Outlines of Universal History, Revised . . . $2.40

By George Park Fisher, LL.D.

Also published in three parts, price $1.00 each. Part I, Ancient History. Part I Mediaeval History. Part III, Modern History.

A new and revised edition of this standard work. Soon after the publication of the first edition of this history the author was honored by the University of Edinburgh with the degree of Doctor of Laws, in recognition of his services in the cause of historical research. In this edition the book is brought fully up to date in all particulars.

Barnes's Brief General History of the World $1.60

By J. Dorman Steele and Esther B. Steele

A complete history of ancient, mediaeval, and modern peoples, as interesting to the general reader as it is valuable as a text-book. Whether considered for its choice of material, its teaching quality, its charm of style, or its richness of illustration, this book stands preëminent as a manual for the class-room or for the general reader. It is one of the best-known and most widely used text-books on the subject.

Swinton's Outlines of the World's History, Revised . . $1.44

By William Swinton

This is a work on ancient, mediaeval, and modern history, with special reference to the history of civilization and the progress of mankind. Its use will stimulate the student to wider historical reading and research.

AMERICAN BOOK COMPANY

NEW YORK CINCINNATI CHICAGO